AMERICAN BAR ASSOCIATION JOVRNAL

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THE OLDEN DAZE

Yes, times have changed in the insurance business—and for the better.

Just think for a moment of the old-time agent. . . . Too frequently he was launched in the business with little or no training, his only preparation being the injunction to "get out and sell." Too often his equipment consisted solely of a sketchy manual, perforated with inadequacies and riddled with exclusions. He got little cooperation from his company. And with this meager assistance, he set out resolutely to face a wary world, half of it totally ignorant of the purposes and principles of insurance and the other half downright suspicious. Under these circumstances, the achievements of the old-time agent are truly remarkable.

Compare his lot with the position of the modern Travelers agent. . . . With thorough training, either through formal courses of home study or in a home office school, he starts out with a complete program of protection designed to suit the individual requirements of his clientele. His company gives him concrete assistance by placing at his disposal competent field workers, inspectors, engineers and other specialists. Furthermore, his company provides valuable, though intangible, aid by means of national advertising, publicity and other promotional activity. Thus he is dealing with a public that is insurance-conscious, receptive to his propositions, confident of his ability and of the integrity of the company he represents.

So here's to the dear, dead days (happily) beyond recall.

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TABLE OF CONTENTS

AMERICAN BAR ASSOCIATION
APRIL 1940 JOVRNAL VOL. XXVI NO. 4

Washington Letter

Judicial Appointments

Two appointments just announced are pleasing to the bar of the District of Columbia, as well as to other citizens of the District. They are the placing of two well qualified local men in the official setup of this voteless—and often politically forgotten—District. David A. Pine, who has been District Attorney here since 1938, was named an Associate Justice of the District Court of the United States for the District of Columbia, to fill the vacancy caused several months ago by the death of Justice Joseph W. Cox. He was endorsed by the local Bar Associations.

Judge Edward M. Curran, who has served with distinction on the Police Court since 1935, was made District Attorney to succeed Mr. Pine.

Word has just come in of the House of Representatives having voted to create ten new federal judgeships. The Judiciary Committee had recommended seven, and three were added on the floor of the House, one being for an additional judge in the Northern District of Illinois. The bill passed the House by a vote of 211 to 136, from which it goes to the Senate.

Attorney General's Committee on Administrative Procedure

This committee was created early in 1939, at the request of President Roosevelt, by then Attorney General Murphy, to ascertain "the extent to which criticisms of the administrative procedure of federal agencies were well founded and 'to suggest improvements if any are found advisable.'" The committee rendered an interim report to the Attorney General when it had completed and reduced to writing its studies of eleven of the fifteen agencies which first were the subject of its inquiries. There were twenty-two other agencies of which it had studies in prospect.

The committee, of which Dean Acheson, of Washington, D. C., is chairman, employed as its director Walter Gellhorn, of the faculty of Law of Columbia University, and a small staff of lawyer-investigators. By reason of shortness of time for the study and the limited staff, it was decided to give attention only to those agencies directly affecting persons outside the Government, either by adjudication or by rule-making, these being the agencies giving rise to the greatest amount of litigation and discussion regarding "administrative law."

Scope of Study

This limitation excludes agencies engaged in the managerial work of the government (e. g., Civil Service Commission, Bureau of the Budget), those engaged in "proprietary" activities (e. g., Tennessee Valley Authority), and those which are confined to lending and public works programs (e. g., Reconstruction Finance Corporation, United States Housing Authority, Federal Works Agency), as well as those which are essentially of a service character (e. g., Bureau of Standards).

The studies involved interviews with officials and employees of the several agencies, with members of the public affected and with attorneys who have represented clients before the agencies. The committee's staff, as observers, attended hearings and other administrative proceedings; and examined the files to discover the methods used in disposing of the business in hand by the several organizations. The tentative reports were given to the officers of the affected agencies for consideration and comment; and thereafter such officers met with the full committee for discussion of the reports.

Consulting Persons Affected

The committee had hoped that during the month of June, 1940, it would be able to hold a series of public hearings in cooperation with various bar and other legal associations, with full opportunity for expressions of opinions on all procedural problems, looking toward a final report to be made in the autumn of this year. It was explained that the committee desires to develop suggestions concerning devices which may appropriately be used in varying circumstances to the advantage of the agencies and of those who are to be guided by the regulations. The probability was suggested that the holding of a public hearing might not be the only, and sometimes may not be the best, method of enabling interested parties to express their views.

It was stated that, in the rule-making process, there ought to be encouraged the utilization of methods whereby agencies may obtain information, opinions, and criticisms from those who may be affected by their rules. As illustrating how an administrator's problems may vary with the subject matter, the number of persons affected, and the types of interests involved, there was mentioned the need of making regulations governing internal procedure in such diversified functions as specifying minimum stock market margin requirements, formulating rules for the construction of oil tankers, and prescribing bookkeeping methods of telegraph and telephone companies.

Tax Domicile in District of Columbia—When?

The very interesting question, of when a Government employee is domiciled in the District of Columbia so as to be subject to the lately repealed tax on intangible personalty, was decided recently by the United States Court of Appeals for the District of Columbia, in *Sweeney v. District of Columbia*, opinion by Justice Rutledge. Its importance seems to be more than academic since our new District income tax law applies to those domiciled in the District.

The petitioner, now an attorney in the Department of Justice, had been actually living in Washington most of the time since 1918, although he always had declared his intention to return, on the expiration of his public service here, to Boston, where he had lived from his birth in 1891 until 1918. In the latter year his home was with his mother there in a rented apartment. It

had not been occupied by him or any member of his family for several years, but he claimed his domicile had remained at that address.

The Court's conclusion was that "we think that one who comes to the District and remains to render service to the Government which requires his presence here, may retain his domicile in the state from which he comes until the service terminates unless he gives clear evidence of his intention to forego his state allegiance."

Tort Suits Against United States

Progress is being made in the Senate Judiciary Committee's consideration of the bill, S. 2690, to permit the United States to be sued for torts.

Recently Charles Ruzicka of Baltimore, member of the Fourth Circuit of the Association's Committee on Jurisprudence and Law Reform, appeared on behalf of the Association to urge the bill's passage. Among the points he emphasized were the time of Congress which would be saved by turning over to its proper place, in the courts, the judicial function of passing upon such claims; and the greater fairness to the claimants which would result if they thus were given, effectively, their day in court, whereas under the present system of handling tort claims against the United States by having Congress pass private bills many worthy claims, even in necessitous cases, are never presented, and some which are do not have their facts properly developed.

A communication in support of the bill was entered in the Senate Committee's records from Howard Cockrill of Little Rock, Arkansas, member of the Association's Jurisprudence and Law Reform Committee from the Eighth Circuit. Numerous other resolutions of approval and explanatory views were received in evidence, including the article in the October, 1939, issue of the AMERICAN BAR ASSOCIATION JOURNAL, p. 828, by Alexander Holtzoff, Special Assistant to the Attorney General of the United States.

Among the many witnesses who appeared and testified on this bill, only one considered it an unnecessary change, Representative Ambrose J. Kennedy of Maryland, chairman of the Committee on Claims of the House. The hearings before the Senate Judiciary Committee will be continued; and it is not possible to say at this time whether they will be completed and the bill reported at this session of Congress. The Committee is making its own inquiry in an effort to determine as nearly as possible how many cases there are in the several departments which might develop into tort claims; and as to the cost to the government, in the past, of private claim bills of this nature.

Doctors and "Restraint of Trade"

If doctors of medicine, or their associations, engage in unreasonably restrictive practice toward other doctors or organizations of doctors, they may be "in restraint of trade" and subject to prosecution under the anti-trust laws, according to a late decision of the United States Court of Appeals for the District of Columbia. It was rendered unanimously by the three justices who sat at the hearing: Chief Justice D. Lawrence Groner and Associate Justices Justin Miller and Fred M. Vinson.

The ruling was on an indictment returned by a federal grand jury in December, 1938, against the American Medical Association, the Medical Society of the District of Columbia, the Harris County (Texas) Medical Society and twenty-one physicians for their allegedly illegal activities against the Group Health Association, a cooperative organization now having approximately 2,458 members in forty-seven of the government agencies. The District Court had ruled, in July, 1939, that the indictment should be dismissed because the practice of medicine was not a trade. The remainder of the story and the reasoning of the Court of Appeals may be indicated by quotations from its opinion. It said, in part:

The Court's Opinion

". . . The charge made here, and for the purposes of the demurrer admitted, is that the societies sought, to restrain an association of persons of modest means from receiving medical services at lower cost and to coerce doctors and hospitals to this end. The charge may be wholly unwarranted and the facts, when they are disclosed on the trial, may show an entirely different state of affairs, but for present purposes we must take the charge as though its verity were established, and in that light it seems to us clear that the offense is within the condemnation of the statute. . . Congress undoubtedly legislated on the common law principle that every person has individually, and that the public has collectively, a right to require the course of all legitimate occupations in the District of Columbia to be free from unreasonable obstructions; and likewise in recognition of the fact that all trades, businesses and professions, which prevent idleness and exercise men in labor and employment for the benefit of themselves and their families and for the increase of their substance, are desirable in the public good and any undue restraint upon them is wrong and is immediate and unreasonable and, therefore, within the purview of the Sherman Act. . .

"Restraints of Trade" at Common Law

". . . the common law governing restraints of trade has not been confined, as defendants insist, to the field of commercial activity, ordinarily defined as 'trade,' but embraces as well the field of the medical profession. And since, as we think, we are required by the decisions of the Supreme Court to look to the common law as a chart by which to determine the class and scope of offenses denounced in Section 3, it follows that we must hold that a restraint imposed upon the lawful practice of medicine and—*a fortiori*—upon the operation of hospitals and of a lawful organization for the financing of medical services to its members, is just as much in restraint of trade as if it were directed against any other occupation, or employment, or business. . .

"The common law rule was applied principally to contracts whereby a man promised not to engage in his occupation, including the practice of medicine, and in many English cases such a restraint on the practice of medicine was described as a contract in 'restraint of trade.' Defendants contend, however, that whatever the English usage, the word 'trade' had in this country a definite and well-understood meaning, and as used in the Sherman Act was confined to transportation and buying, selling or exchanging of commodities, and in any case was not intended to apply to any employment or business carried on by the 'learned professions.' The determination of this aspect of our problem lies in the answer to this proposition. . .

Enlargement of Meaning of "Trade"

"The indubitable effect of all these cases, English and American, is to enlarge the common acceptance of the word 'trade' when embraced in the phrase 'restraint of trade' to cover all occupations in which men are engaged for a livelihood. We think it makes no difference that, after the practice of medicine had been recognized in the doctrine of 'restraint of trade,' *Davis v. Mason*, supra, a number of judges preferred to speak in broader terms of 'public policy' and the like without using the word 'trade.' . .

"Defendants contend as a subsidiary argument that without regard to whether the restraint would or would not be an illegal act ordinarily, it is not so in the present instance for the rea-

(*Continued on page* 382)

THE CONSTITUTION TODAY*

One Hundred and Fiftieth Anniversary of First Session of Supreme Court Suggests Thoughts on Constitutional Origins and Developments—Growth and Changing Emphasis—Origin of an Independent Judiciary—Vitality of the Constitution—Judicial Restraint on Other Governmental Agencies—Strong Central Government Necessary in Early Years, But Need Now Is for Decentralization—War of the States—Democracy and Government

By Hon. Hatton W. Sumners

Chairman, Judiciary Committee, House of Representatives

I WANT to speak to you on this occasion in a very plain, practical sort of way; on this, the one hundred and fiftieth anniversary of the inauguration of the Supreme Court, I want to give you, if I can, the picture of our constitutional development, the place which the Supreme Court holds in that scheme, and particularly the responsibility that rests upon you and me in this the one hundred and fiftieth year after the inauguration of the last of the three great departments which constitute the functioning machinery of this Government. The first President had been elected, of course; the First Congress had convened on March 4 of the preceding year. On the next day after Congress convened a Committee on the Judiciary was appointed. The Judiciary Act was approved by Washington on September 24, 1789. On the same day he sent in his nominations for the Supreme Court as provided by the Act. John Jay, of New York, was nominated to be Chief Justice; Rutledge, of South Carolina; Cushing, of Massachusetts; Harrison of Maryland; Wilson, of Pennsylvania; and Blair, of Virginia, to be Associate Justices. Harrison declined to serve and James Iredell, of North Carolina, was appointed in his stead. Thus was inaugurated the last of the three departments of the Federal Government. It was an independent judiciary. The independence of the judiciary had been secured by two provisions of the Federal Constitution. One is that "Judges shall hold their office during good behavior," the other provides that they "Shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."

Origin of Independence of Judiciary

The notion of an independent judiciary did not originate with the Federal Constitutional Convention, however; the origin and evolution of the chief of these provisions securing the independence of the judiciary is typical of most of the provisions in our written constitutional structure. They each originated in necessity and practically all of them had been tested by experience for a long time before the beginning of our independent governmental existence.

For a long time prior to the coming of William and Mary to the British throne there had been much complaint and bitter resentment over the fact that the Kings of England, who appointed the judges, and especially during the regime of the Stuarts, either directly or indirectly controlled their judgments. Public opinion condemned that practice and public purpose set about its correction. In the Act of Settlement of the Succession with William and Mary in 1701 it was provided that judges "shall hold office as long as they behave themselves well." This provision originated out of the necessity to correct a definite, well-recognized maladjustment of the machinery of government. But it did not complete the correction. Later it was discovered that the tenure of the judges terminated with the demise of the King. So, when George III came to the throne some 59 years afterward, in 1760, to correct that condition it was provided, as one of the first, if not the first, act of his reign, that judges should hold office as long as they behaved themselves well, notwithstanding the demise of the King.

As indicating the trend of constitutional development on that side of the Atlantic, moving power away from its centralization in the King, later on in the reign of King George it became an axiom of the British Constitution that in the event of a disagreement between the Parliament and the King any appeal taken to the people through the medium of an election should be made by the ministry and not by the King. This was consummated five or six years after the adoption of our Federal Constitution. Internally they were decentralizing. They had long been a nation. Internally we were centralizing; we had not yet become a nation. In order to have the whole picture of those times it is well to have in mind that there were then approximately half as many people in the Colonies as in England, in round numbers 8,000,000 people in England and 4,000,000 on this side of the Atlantic.

Constitution Developing on Both Sides of the Atlantic

During the period of colonization, while we were bargaining with the British Crown, it to induce us to emigrate to America, and we for sufficient privileges and liberties to induce us to emigrate, and were writing the resultant negotiations into the terms of the royal charters of the Colonies, things equally as important bearing directly upon our own constitutional structure and the place of our Supreme Court in our structure of government were taking place on the other side. Our own Constitution was being shaped at the same time on both sides of the Atlantic. As we have seen, the independence of the Court which we inaugurated 150 years ago was fixed in our Constitution by our ancestors in 1701 in the Act of Settlement.

At the time this provision of the Constitution, establishing the independence of the judiciary, was being presented to, and accepted by William and Mary, there was also presented to them the Bill of Rights, which was accepted. It contained the following provisions

*An address delivered in Congress on February 1, 1940.

which were later incorporated into our written constitutional structure:

> That levying money for or to the use of the crown, by pretense or prerogative, without grant of parliament, for longer time or in other manner than the same is or shall be granted, is illegal. That it is the right of the subjects to petition the king and all commitments and prosecutions for such petitioning are illegal. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law. That elections of members of parliament ought to be free. That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. That jurors ought to be duly empanelled and returned and jurors which pass upon men in trials for high treason ought to be freeholders. That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliament ought to be held frequently. And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties.

Origin of the Constitution

If I could do only one thing in America, I would have it understood, and it is the truth, that while the men who met in the Constitutional Convention at Philadelphia were great men, they did not create the Constitution of this Government. I want to emphasize that. The Constitution of this Government has a higher authority than the words of men to support it. It came from a source higher than the source of any convention.

Your Constitution and mine existed in the very nature of things before there was any positive precept. It is perfectly evident when you examine life that the Almighty God intended that men should be free. I want you to think about that a minute. In God Almighty's economy He does not attempt to protect human beings against difficulties. In fact, He creates difficulties. The difficulties which we experience in operating a system of free government constitute a part of the gymnastic paraphernalia provided by God Almighty for the development of people. The development of people is the central objective of Nature.

The love for liberty, the ambition to be free, the aspiration to be free, have not been given to us in order that we may merely enjoy the blessings of liberty but in order that we first may struggle to be free and gain strength by the struggle; second, that we may discharge the duties incident to freedom and gain strength by their discharge. That is the plan which God Almighty has intended. That is our plan. It is susceptible of proof. It could be proven before any jury on earth. Therein lies the security of our Constitution and the certainty that it cannot successfully be attacked by those whom we call the "reds" if we but understand it and do not forget that "eternal vigilance is the price of liberty."

Its provisions did not come from the speculations of political philosophers or the deliberations of conventions. They originated out of necessity and they were tried by experience among a people peculiarly gifted with the genius for self-government before we ever came to the responsibility of writing our State and Federal Constitutions. Therefore, our Constitution has supporting it human authority, the men who met in conventions, and in addition to that it is supported by the fact that it has stood the test of the ages.

It is not something that just came from the creative genius of some men, although human beings have helped.

The notion of a fundamental natural law, supreme and dominant in the social and governmental relations of men, had taken firm root in the philosophy of thinkers as far back as Aristotle. Perhaps men have held to that conviction as far back as men have observed correctly and thought clearly and analytically. Cicero distinguished between *summa lex*, which existed according to his philosophy always before governments or written law, and *lex scripta*, written laws of man's making, which were to be regarded as void if they were contrary to the laws of nature.

In the Middle Ages such great jurists as Bodin of France and Suarez of Spain agreed with these views but went further and held that God had planted a consciousness of these laws in the mind and conscience of man, from which one's understanding of natural rights was derived, and held further that a statute which was contrary to natural justice was *ipso facto* void. Grotius was in general agreement with this philosophy. Coke, Fortescue, and Blackstone agreed. Blackstone held, however, that there was no power to prevent Parliament from violating the supreme law. However, he did not go so far as some of our American commentators have gone who say that the Constitution is what the Supreme Court says it is or so far as some of the commentators on the Britsh Constitution go who say that the British Constitution may be changed by the British Parliament. Neither of these statements is correct.

Vitality of Constitutions

There is no power to prevent the British Parliament from enacting a law contrary to the British Constitution but that violation of the British Constitution does not change the constitution. It is true there is no power to prevent an ignorant or venal supreme court, if there should come to be such a court, from falsely interpreting or falsely applying the provisions of the constitution but the constitution would remain unchanged. We should merely have to await a happier day when the powers which had been abused and the trusts which had been betrayed should pass to fitter hands.

On both sides of the Atlantic, but chiefly on the other side, due to its longer history, the history of this people is replete with the record of great occasions and great achievements when the people, who had for a time been negligent, have aroused themselves and rescued their constitution and revitalized and reestablished it as the supreme law of the land.

One of these instances was the reestablishment of the independence of the judiciary to which I have referred, and while they were doing that they assembled into a documentary statement certain of their fundamental rights, which they had long claimed as a part of their constitution, but which by the power of the kings and the construction of the judiciary which the kings controlled, had been denied to the English people. But these rights still lived.

When we came to write our Federal Constitution we brought forward into the written documents not only the provision with regard to the judiciary to which I have referred but the Bill of Rights as well. We did not borrow that Bill of Rights from the British Constitution or the provision with reference to the tenure of the judges from the British Constitution, as our

commentators sometimes erroneously state. They belonged to us as much as they belonged to the people on the other side.

This seeming digression is in fact not a digression. It gives us a more comprehensive, though imperfect view, of our general constitutional development, moving us toward the creation of our Supreme Court and the establishment in that Court of the powers which the Constitution assigns to it.

Obviously we can go no further into an examination of our constitutional development which took place on the other side of the Atlantic; neither shall we be able to examine the philosophy of Paine and others asserting the non-supremacy of kings and parliaments and judges and human government as against the inalienable, natural rights of men, and the inherent limitation upon the fashion and power of governments and the discretion of governments and of their agents. We shall not be able, either, to examine the Colonial Charters, the forerunners of our State and Federal Constitutions, and in many respects the most interesting and most important part of our written constitutional development. In passing may I recommend especially an examination of the charter of Rhode Island granted in 1663. Everything considered, that charter of the little colony of Rhode Island, granted 277 years ago, is one of the greatest state documents of all time.

It is known, of course, that the State constitutions preceded the Federal Constitution and contained all the basic provisions later incorporated in the Federal Constitution and many of its less important provisions as well.

Federal Governmental Development

Our Federal governmental development, in the scheme of which the Supreme Court has so large a place, both in its natural position and in the result of its decisions, began, no doubt, soon after the establishment of the American Colonies. The facts of common interest among the people of the Colonies, the influence of common origin, in the main, the same language, similar institutions, the same governmental instincts, community of interest, common dangers, and later joint achievements in behalf of the common interests, began early to draw and to press this homogenous people back upon themselves into greater and greater solidarity and unity.

The articles of "Firm and Perpetual League of Friendship," entered into in 1643 between the jurisdictions of Massachusetts, Plymouth, Connecticut, and New Haven, have so many provisions and characteristics common to both the Articles of Confederation and the Federal Constitution as to leave no doubt of their close relationship. Just as the meeting called by Simon de Montfort in the thirteenth century was the forerunner of the British Parliament this meeting and its resolutions were the forerunners of the Continental Congress, the Articles of Confederation, and of the Constitution of the United States.

We often hear the statement that the Revolutionary War was fought under the Articles of Confederation. The fact is that the Articles of Confederation were not ratified until the spring of 1781, and Cornwallis surrendered in the fall of that year. There is another erroneous statement, that when the Federal Constitutional Convention met, the Articles of Confederation were, figuratively speaking, thrown out the window. A comparison of the provisions of the Articles of Confederation and those of the Constitution and the weight of probabilities make that statement absurd.

Supreme Court Origin

The Supreme Court was not the first to function as such a court in this country. Prior to the adoption of the Articles of Confederation, the Continental Congress made of itself a semivoluntary Supreme Court in certain matters of the then inchoate and embryonic Federal Government. From their membership they created what they first called a committee, and later on they called it a court to which it was directed that appeals should lie from proceedings with reference to captured vessels. These vessels were being claimed as prizes of war. All sorts of conflicting interests and claims were growing out of these transactions. In some instances the citizens of foreign nations and foreign nations themselves were involved. During the siege of Boston, Washington was compelled to give much time to the adjustment of these controversies. He wrote a letter to the Continental Congress asking that something be done about it. In response, Congress requested that the colonies erect courts, where they did not already exist, to try issues arising out of such captures, and to allow juries in all cases, and that all appeals be to the Congress. Not only was this class of cases appealed to, and adjudicated by the tribunal created out of the personnel of the Continental Congress, but a serious dispute between Pennsylvania and Connecticut over their boundary line was adjudicated. A great practical lesson was learned by those experiences and later it became fixed in the Federal Constitution that there should be a Supreme Court of the United States, and that its judges should have jurisdiction of the class of cases adjudicated by this voluntary Federal tribunal.

Controversies, conditions, and the helpful services of a tribunal authorized to adjudicate such controversies, and the need for a governmental agency strong enough to enforce the judgments of such a tribunal, helped to impress the necessity of a "more perfect union," with a court clothed with such judicial powers as were later given to the Supreme Court by the Constitution.

Supreme Court Decides Constitutional Limitations

While the independence of the judiciary had already been established, it remained to be determined in this country whether the Supreme Court of the United States has the power to declare void an act of any Federal agency or of a State which it deemed to be in violation of the Federal Constitution.

The great controversy with reference to the Supreme Court, which arose out of the decisions of *Marbury v. Madison* (2 L. Ed. 60, 1803), of *McCulloch v. Maryland* (4 L. Ed. 579, 1819), and *Dartmouth College v. Woodward* (4 L. Ed. 629, 1819), and so forth, brought definitely to issue whether the Supreme Court had authority to declare an act of Congress or an act of a State unconstitutional.

We are all familiar with these great, far-reaching decisions. Jefferson challenged the authority of the Supreme Court to declare an act of Congress or an act of a State unconstitutional, contending, in substance, that the other two departments of the Federal Government and the States are each charged with a responsibility to the people of acting within their respective constitutional limitations; that our constitutional system provides an adequate remedy and practical machinery for its enforcement—popular elections. He felt that to give to the Supreme Court the power to declare the acts of agencies of the Federal Government and of the States void, and also to be the sole judge of its own constitutional power was so incompatible with the na-

ture of a democracy that it would destroy the Government.

Judge Roane, of Virginia, led the people of Virginia in their attack on Marshall. Marshall was very much aroused. He seems to have written many letters; he urged the necessity of the friends of the Government to arouse themselves; he considered that there was danger of a reaction toward the old Government under the Articles of Confederation. The thing which seemed to have affected him most is indicated by the following quotations from one of his letters:

> I cannot describe the surprise and mortification I have felt that Mr. Madison has embraced them—

referring to Virginia's contentions, insisted upon by Mr. Jefferson.

State Courts Had Already Exercised This Power

It is an interesting fact that Marshall, however, was not the first to claim the right and the duty of the judiciary to pass upon the constitutionality of legislative and administrative acts. In an opinion by the Supreme Court of New Jersey, Holmes against Walton, 1780, though the record is not to be had, it seems clear that it was held that an act of the legislature providing for a trial by a jury of six men was void because it was violative of the New Jersey Constitution.

There was much controversy in the following session of the legislature with reference to this and other similar decisions. In the case of Commonwealth of Virginia against Caton, decided in 1782, the court gave the opinion that it had the power to determine the constitutionality of an act of the legislature and to declare those acts void which were contrary to the Constitution. Prior to 1814, there were numerous other State court holdings to the same effect in New York, Connecticut, North Carolina, South Carolina, Pennsylvania, Ohio, and Vermont.

Mr. Gerry, of Massachusetts, in the Federal Constitutional Convention in 1787 said:

> In some States the judges had actually set aside laws as being against the Constitution. This was done too with general approbation.

While there was much criticism of the decisions of Marshall, particularly in Virginia, Kentucky, and Ohio, there probably was fairly general approbation throughout the country.

In *Worcester v. Georgia* (8 L. ed. 483), decided in 1832, the Supreme Court of the United States held that an act of the Georgia Legislature, undertaking to regulate missionaries among the Indians, was unconstitutional. The State of Georgia ignored this decision. The executive branch of the Federal Government refused to lend itself to the enforcement of this judgment. Finally, the matter ended by the missionary's being released after some 18 months' confinement. This was perhaps the most severe blow which Marshall received during his long judicial career.

It is an interesting coincidence that Georgia had figured in another very important decision by the Supreme Court (*Chisholm v. Georgia*, 1 L. Ed. 440). Jay was then Chief Justice. It involved an action for debt by a citizen of another State against the State of Georgia. The decision, rendered in 1793, held that a State could be sued in the Federal courts at the instance of a citizen of another State. Two days after its rendition the eleventh amendment to the Constitution was proposed in Congress and the following December it was submitted. Ratification was not completed until the beginning of 1798. No action seems to have been taken in the matter, however. There were several suits similar to that of Chisholm against Georgia already pending. But before the first of these pending cases (*Hollingsworth v. Virginia*, 1 L. Ed. 644, 1798) reached the Supreme Court, the eleventh amendment had been ratified and the court in a unanimous opinion held, in view of its phraseology, that the judicial power of the United States "shall not be construed to extend," instead simply that it "shall not extend" to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens, or subjects of any foreign state, that the amendment had a retroactive effect, and thus the Court would renounce jurisdiction in any case of this nature, past or present.

Harris & Ewing

HON. HATTON W. SUMNERS
Chairman, Judiciary Committee
House of Representatives

It is worthy of note that when the judgment against the State of Georgia was affirmed, Georgia responded by a statute prescribing the death penalty against anyone who would undertake by any process to enforce the judgment within the State.

Lessening Judicial Restraint Upon Other Governmental Agencies

With the election of Jackson in 1828, the fight on the policies of Marshall was renewed with great vigor. Chief Justice Taney, who had been in Jackson's Cabinet, was a great influence in the Supreme Court in lessening the restraint which that Court had exercised upon the States and departments of the Federal Government.

It is not at all improbable, if we had time to examine

beneath the surface of developments as they are given to us by the historian, we might discover that one of the reasons for the change in the policy of the Supreme Court might have been the fact that union among the States at the time of the change had by natural processes made considerable progress. It is not improbable that it was a natural thing that the Supreme Court should have been instrumental in helping to concentrate governmental power at the point where this union was taking place. Public opinion, the arbiter in disputes affecting the public interest, probably helped determine the matter. As when a broken bone is being healed or the parts of plants are being engrafted upon each other, nature seems to move its energies to the point of weakness, to strengthen it by what means it can, until the unifying fibers by natural processes shall have done their work.

It may be also that Marshall was so absorbed by his concern for the establishment and preservation of a strong central government, that he overlooked or underestimated the importance of preserving the efficiency and virility and fundamental sovereignty of the several State democracies which had created the Federal organization as their agent to do for them certain things which individually they were not able to do and to act as the repository of certain governmental powers which they each surrendered to the others.

On the other hand, Jefferson and Jackson and their associates may have underestimated the necessity at that time of permitting governmental strength to move to the points in the governmental structure where union among the States was being effected by natural processes, but had not yet become an actuality. These observations are not so fantastic as at first consideration they may appear.

Movement of Governmental Power During National Formative Period

In the whole process of national development, when tribes are blended into principalities and principalities into petty governments and these petty governments into a great nation, it is a historical fact that governmental power moves up from the people and from the smaller units of government to the point where union among the newly associated peoples and territories is being effected. That always happens. It seems to be in response to natural law. Clearly the adoption by the States of the Federal Constitution did not unite the people of the States; it did not constitute of them a nation.

I do not believe there is anything more interesting than the history of our own Union—the history of how we came to be a nation—the history of how we got into the big row in 1861. I think it is perfectly clear as we look back at it now. An examination of the debates in this Congress discloses the different stages of the growing together of these States. The Constitution was like the tape wrapped around plants being grafted. If there be proper adjustment, if there be kinship in those plants, Nature gets to work—Nature did get to work. If we had the time, I would like to direct your attention to significant utterances on the floor of this House and in the other Chamber in the different crises of the country, showing clearly the relative stage of the development in our becoming a nation.

I will mention, however, one example. John Quincy Adams and twelve of his associates, when Texas was about to be admitted, issued an address to the people of the country in which they said that the admission of Texas would amount to a dissolution of the Union, and the non-slave-owning States would not, and should not, submit. Just across the river here was a gentleman—Wise, of Virginia, who was in this House—and it made him very angry—the idea of these Yankees uttering these treasonable things right here in the Hall of Congress—and he moved to expel them. Seventeen years after that Wise was the head of a Confederate regiment trying to put into effect the doctrine which Adams had declared, and the Adams crowd were having conniption fits about these things that Wise and his people were doing. If it were not so closely associated with that great tragedy, it would be an amusing thing.

Structural Reason of War Between States

We do not have time to examine the details of that development. It is sufficient for us to note at this time that we have come to be a nation. We were overlong in arriving at our nationalization, due primarily to the fact that in the beginning the institution of slavery as a foreign substance was left in the Constitution lying between the two great sections, North and South, and soon there was added to it the policy of the protective tariff. The States of the two sections had long been united.

Each of the great sections, when in control of the Federal organization, used that organization to promote and protect its interests with regard to these two issues. Lying side by side, these two issues were too thick for the fibers of union to penetrate. As a result, under the increasing strain, in 1861, we broke at this point of weakness. The Southern States which theretofore had denounced the doctrine of secession which had come from Northern States, having lost control of the Federal organization, pulled apart, seceded. The Southern States seceded because they had lost control of the Federal Government. The Northern States did not secede because no one secedes from that which he controls.

As a result of the War between the States, one of these foreign elements was removed, and as a result of economic developments the protective tariff has been largely absorbed into the general economic and political body of the two sections. We are now a nation united.

Governmental Progress in a Democracy

We have been a nation, probably since the Spanish-American War, certainly since the World War. When a people, operating our sort of government, have reached that stage in their national development, it is a historically established fact, and one with which reason has no difficulty in agreeing, that from that time forward all progress in such a government must be in that direction which moves governmental power away from the central organization to which it was moved at the time when the processes of unification were taking place or great emergencies were being dealt with, back into the smaller units of government which are the natural instruments for the functioning of a democracy. Democracy is a government by the people. In order for the people to govern and to continue to develop their capacity to govern they must have the power to govern and the necessity to govern as close to them as it is practical to place it, and there must be provided for their use governmental machinery adapted to the exercise of these functions by the people.

For too long a time we have overemphasized the Federal organization in our scheme of government. We ought to have been moving this overallocation of power and governmental responsibility away from it long ago.

(Continued on page 367)

RESPONSIBILITY OF TRUSTEES UNDER THE FEDERAL TRUST INDENTURE ACT OF 1939*

By Wilber G. Katz
Dean, University of Chicago Law School

PERHAPS the most hotly debated provisions of the Trust Indenture Act of 1939[1] are those relating to the responsibility of the corporate trustee. The act requires the insertion in qualified trust indentures of certain affirmative provisions and forbids the insertion of many of the usual immunity clauses. To understand the effect of the act it is necessary to analyze a number of related provisions, some of which define the scope of the trustee's functions and others deal with the standard of responsibility to which it is to be held in the performance of those functions. The force of these provisions, furthermore, cannot be fully understood without considering other provisions such as those relating to definition of events of default, notice of defaults, and the power to bondholders to direct action by the trustee.

One of the central provisions is that with respect to immunity clauses against liability for negligence. Section 315(d) provides that an indenture shall not contain any provision "relieving the indenture trustee from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct. . . . ." Standing alone, this probably would effect a very radical change in the responsibility of the trustee. I say probably because there is some doubt under the decisions as to the effectiveness of such immunity clauses. Trustees have not been able to rely on such provisions with confidence, although Judge Rosenman, in the celebrated case arising out of the National Electric Power Company debenture issue,[2] decided with great reluctance that such a clause protects the trustee from liability for negligence. There is perhaps more doubt under the decisions in states other than New York, although questions as to the validity of immunity clauses are often confused with questions as to the scope of the trustee's powers or duties, or as to what constitutes gross negligence or willful misconduct.

I have said that if this provision stood alone, it would radically change the trustee's position. It does not stand alone. There is the express exception that the indenture may contain provisions protecting the trustee "from liability for any error of judgment made in good faith by a responsible officer . . . , unless it shall be proved that such trustee was negligent in ascertaining the pertinent facts . . ." Questions may arise, of course, as to what constitutes "errors of judgment." The language of this provision, however, makes it clear that the phrase was intended to cover not only action where the judgment of qualified and prudent men may differ, but negligent action which would result in liability were it not for the exception.

It has been suggested by a group of lawyers who have drafted model provisions for indentures to be qualified under the act that there should be inserted in indentures a definition of the term "responsible officers" used in this provision. They suggest that "The designation of such of the executive officers of the trustee and its junior officers assigned to the supervision of trust functions as may be desired by the trustee would seem to constitute a compliance with this statutory requirement."[3] These model provisions and the explanatory notes published in connection with them are of special interest because they were discussed with members of the S.E.C. staff and the Director of its Registration Division has stated that the provisions appear to meet the requirements of the act and that he sees no objection to statement contained in the notes.

To the extent that the immunity of trustees is restricted by the provisions of section 315 to which I have referred, additional importance is attached to the definition of the scope of the trustee's functions. Here the act makes the primary distinction between functions before default and those after default. Before default, the trustee's duties may be limited by indenture provision to "such duties as are specifically set out in such indenture." Section 315(a) (1). On the other hand, the indenture must contain provisions requiring the trustee "to exercise in case of default . . . such of the rights and powers vested in it . . . . , and to use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs." Section 315(c). I shall refer later to each of these rules; at present, however, it is important to note the importance which this distinction gives to the definition of "default."

The act provides that for the purpose of these rules "default" means event of default, as prescribed in the indenture itself. The original Barkley Bill gave the Commission power to establish rules as to what should constitute events of default, but the final act neither contains provisions directly regulating this subject nor grants the Commission any discretion in the matter. Furthermore the model indenture provisions to which I have referred follow closely the previous practice. Under these provisions, failure to pay principal constitutes a default without grace period or demand; failure to pay interest or sinking fund instalments automatically becomes a default after a stated grace period; institution of various types of involuntary liquidation or reorganization proceedings becomes a default after a stated period. Failure to perform most covenants, however, becomes a default only if the failure is not made good within a specified period after demand by the trustee.

Provisions must be inserted in indentures requiring the trustee to give to bondholders notice of known defaults. Section 315(b). There is a saving clause, however, that the trustee shall be protected in with-

*A portion of an address delivered before the Chicago Bar Association February 27, 1940.

1. This act added a new title, Title III, to the Securities Act of 1933. 53 Stat. 1149, U. S. C. A. § 80.

2. Hazzard v. Chase National Bank, 159 N. Y. Misc. 57, 287 N. Y. Supp. 541 (1936).

3. "Suggested Provisions for Corporate Mortgages and Indentures under the Trust Indenture Act" (published by Commerce Clearing House, Inc.), note to section 7.03.

holding notice if "the board of directors, the executive committee, or a trust committee of directors and/or responsible officers, . . . in good faith determine that the withholding of such notice is in the interests of the indenture security holders." This proviso does not apply to defaults in principal, interest or sinking fund payments.

To return to the problem of the trustee's responsibility before default, as I have already stated, the trustee's duties may be limited to those specifically set forth in the indenture. In the model indenture provisions it is suggested that this provision makes unnecessary the usual immunity clauses concerning recording, application of proceeds, insurance, taxes, etc.

The original Barkley Bill required that an indenture contain provisions imposing on the trustee such duties prior to default "as the Commission deems consistent with the duties . . . which a prudent man would assume and perform prior to such default if he were trustee under such an indenture." This provision, like most of those granting discretionary power to the Commission, was eliminated. The trustee is required to examine, in the light of indenture provisions, various certificates and opinions required to be filed to evidence performance of covenants or compliance with conditions precedent. Section 315(a). The trustee is permitted, however, to rely conclusively (in the absence of bad faith) on such certificates or opinions. Section 314 contains elaborate provisions as to filing with the trustee of opinions of counsel with respect to recording and maintenance of the lien of the indenture and opinions and certificates of accountants, engineers and appraisers with respect to issuance of additional bonds or release or substitution of mortgaged property. Except in the case of relatively small transactions, the accountant or engineer must be "independent" and must be "selected or approved by the indenture trustee in the exercise of reasonable care."

Turning to the responsibilities of the trustee after default, the general rule, as I have said, is one of due care, care such as a prudent man would use in the handling of his own affairs. Section 315(c). Verbally, at least, this provision is less stringent than that of the original bill which required that the trustee exercise such care as a prudent man would exercise "if he were a fiduciary and had the degree of skill which the indenture trustee has, or which the indenture trustee . . . represents itself as having, whichever is the higher."

One point which may give trustees concern arises from the fact this duty of care arises immediately on default (as defined in the indenture); there is no provision that before being thus responsible the trustee must know of the default or even that the default be one of which it could have learned in the exercise of due care. On the face of it, this would seem to make the trustee absolutely liable to know whether a default exists. Of course, many defaults arise only after the trustee has made a demand. Difficulty may arise, however, with respect to defaults arising through the filing of various types of voluntary or involuntary petitions for liquidation or reorganization. These defaults are usually defined in terms which do not include any notice or demand. Such proceedings, however, would presumably be more or less notorious and, in any event, I cannot believe that the act would be construed to require the trustee to know of such defaults at its peril.

Of more importance is the general question confronting the trustee upon a default in an interest or sinking fund payment. It was frequently argued in the hearings on the bill that the new responsibilities

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imposed would make it impossible for the trustee to delay legal action under any circumstances; that upon default the trustee will always file some sort of judicial proceeding in order to minimize the risk of liability.

It may be argued that this is an extreme position, particularly since the bondholders will, in any event, be notified of the default. But it is important to consider in this connection the provision of section 316(a) which deals with the power of bondholders to direct the trustee in the exercise of its powers. It was formerly not unusual for indentures to provide that 25% of the bondholder might require the trustee to institute foreclosure proceedings. Section 316(a) provides that such power to direct the trustee may be granted to holders of not less than a majority of the bonds. At first glance this may seem an extraordinary provision to find in an act of this kind. But its purpose was undoubtedly to leave the responsibility with the trustee and to forestall the argument that the bondholders, with notice of the default and access to the bondholders' list (section 312), should have some responsibility for determining the action to be taken. Under all the provisions of the act, therefore, it is likely that trustees will seldom feel justified in delaying action on default in the hope that the default may be cured. The draftsmen of the act, however, seem to have believed that there is more risk of loss to bondholders through delay in starting proceedings which prove unavoidable than through the precipitation of unnecessary proceedings.

The next questions faced by the trustee relate to the type of proceedings to be instituted and the extent of the trustee's participation. These questions will frequently be puzzling, especially in the light of the

criticisms by the S.E.C. of the inactivity of trustees in connection with reorganizations. The reports of its investigations made it clear that the Commission believed that indenture trustees should be concerned with the entire reorganization process, although the Commission's view as to the relation between the trustee's functions and those of protective committees and court-appointed trustees or receivers was never made clear.

Because of the general doubt as to the extent of their functions, I should expect corporate trustees to favor proceedings under chapter X of the Bankruptcy Act rather than foreclosures or other types of reorganization proceedings. Chapter X contemplates that responsibility for the protection of investors is to be shared in most cases by an independent trustee or examiner, protective committees, the S.E.C., and the court. The chapter provides that indenture trustees may be heard upon all matters, including the appointment or continuance of the independent trustee and the approval of the reorganization plan, but there would seem to be little risk of liability for negligence in the exercise of these powers.

In most cases, presumably, the indenture trustee will be able to induce the corporation to file a voluntary petition under chapter X. Where this is not the case, while the trustee is authorized to file an involuntary petition, difficulty may arise since such a petition usually requires proof of an act of bankruptcy or pendency of a bankruptcy or receivership proceeding. In some cases the trustee may be able to set the stage for an involuntary proceeding under chapter X by first filing a foreclosure proceeding.

I believe that trustees may hesitate, however, to prosecute foreclosure proceedings as a means of effecting a reorganization through judicial sale. The reports of the S.E.C. investigation of protective committees made much of the fact that trustees have not exerted themselves to see that majority committees are forced to bid comparatively substantial amounts at foreclosure sale and thus to assure to dissenters a substantial cash distributive share. I have never believed that it should be the function of the trustee to take an active position on a question on which the interests of majority and minority bondholders directly conflict, but, with a general duty of care on default, trustees may well be concerned as to the view which courts might take.

There may also be a question as to whether due care requires the trustee to scrutinize the plan of reorganization pursuant to which the majority bondholders purchase at foreclosure sale and to make objections if there are elements of unfairness. I should expect, furthermore, that trustees would feel increasing concern over their duties with respect to the collection of deficiency judgments. These and other problems inherent in the foreclosure method of reorganization will, I believe, lead trustees to prefer proceedings under ch. X.

As a result of the assumption of a general duty of care, we may also see trustees hesitate to exercise the more extraordinary powers vested in them by the indenture, such as the power to enter into possession. Counsel may decide, furthermore, that in drafting indentures it is safer to omit some of the less frequently exercised powers; for example, the power to purchase at foreclosure sale for the benefit of all bondholders.

It should perhaps be added that the Trust Indenture Act does not itself impose burdensome liabilities upon the corporate trustee.[4] Even as to material misstatements in information which the trustee must furnish with respect to possible conflicts of interest, the liability provisions are very much more lenient than those of the Securities Act of 1933. The responsibilities which may give the trustees concern are those which arise from provisions which the act requires to be inserted in trust indentures.

Many times during the Congressional hearings it was stated by opponents of the bill that the losses of investors were in most cases due to economic conditions and not to inactivity on the part of corporate trustees. I think we must admit the truth of this statement especially if we may make one addition. The losses of investors were in most cases due to economic conditions plus corporate financial structures built for fair weather only. I cannot feel any great confidence in what the Trust Indenture Act and its companion pieces may accomplish. In the long run, I suggest that perhaps MR. JUSTICE DOUGLAS may have accomplished more for the protection of investors by his opinion in *Case v. Los Angeles Lumber Products Co.*[5] In that case he carried the Supreme Court with him in an emphatic endorsement of the principle of full priority for creditors in reorganization plans. If the Court adheres to this principle, and if promoters and bankers and lawyers come to realize that holders of equity securities risk being wiped out in reorganization proceedings, there may be some hope for sounder capital structures in the future, for less debt financing and larger equity margins. It may well be that in the legislation of the last decade we have given too much attention to the reform of foreclosure and reorganization and too little to the encouragement of corporate financial structures which may have a reasonable chance of withstanding the strains of an unstable economic system.

4. Sections 305 (a), (d), 309 (d), 323.
5. 308 U. S. 106, 60 Sup. Ct. 1 (1939).

Woman and the Law

(*Continued from page* 358)

mous. Enlightened jurisdictions consider the real meaning of support and require mutual support of spouses. Red herrings are much in evidence.

The naked truth is that women have been read out of the Constitution by the courts and it is necessary for them to get back in by Constitutional Amendment. It will be done; it is just a matter of how long. Let us hope as much time and energy as was required for the Suffrage Amendment will not be consumed. After that the procedure will be simple, and the confusion, like that predicted for the Nineteenth Amendment, will be about as volcanic and epoch-making as that which came about in the Maryland Constitution which goes into minute details on most matters. Article I of that document sets forth the qualification of voters. Originally it designated them as "every white male citizen." As the Maryland Constitution appears in the edition of the Maryland Code still in use, a tiny figure 1 is perched high between the words "every" and "male" and a footnote explains that the word "white" was omitted under the Fifteenth Amendment of the Constitution of the United States. When they get around to publishing a new edition of the Maryland Code, another figure will take the place of the word "male" and a footnote will explain that it was omitted under the Nineteenth Amendment to the Constitution of the United States. Footnotes and substitution of single words will eradicate many tragic blots on American "justice."

Until this is done, the inscription over the pretentious portals of the marble palace which houses the Supreme Court should be changed to "Unequal Justice Under Law."

LEGAL SERVICE FOR LOW INCOME GROUPS IN SWEDEN*

Milwaukee Figures Analyzed for Comparison with Stockholm—Swedish City Handles Much More Business, as it Serves People of Small Means as Well as the Poor—Legal Aid Calls for Expansion—Public Needs More Pressing Than Ever—Conclusions

By Lloyd K. Garrison

Dean of the Law School, University of Wisconsin; Member of President Roosevelt's Commission on Industrial Relations in Great Britain and Sweden, 1938

TAKING the identifiable group of 1,394, it appears that the overwhelming majority (about 78%) were referred by officials or agencies of the law or of government. Of the 879 who were referred by officials or agencies of the law, it is interesting to note that fully 681 sought or received their information from those having to do with the criminal law, the great bulk from the District Attorney, and the remainder chiefly from the police department, the county jail, the probation department, and the city detective bureau. 88 were referred by judges and clerks of courts (whether criminal or not does not appear) and 54 by other city officials, chiefly by the elected City Attorney. Only 36 were referred by private lawyers. 18 came from other legal aid societies,[42] one from the county law library and one from the United States Department of Justice.

Of the 212 who came from city and other governmental agencies not connected with the administration of justice, the great majority were referred by various relief agencies, and most of the remainder by the Industrial Commission. Others sought advice from the city building inspector, the city health department, the automobile license bureau, the Post Office, and so on.

Only about 6% of the total were referred by social agencies, churches, and charities, while less than 1% were referred by doctors and medical centers.

Make-up of Group Served in Milwaukee

One gets the picture from all these figures of a group of poverty-stricken people, not knowing where to go, thinking of the administration of justice first of all in terms of the criminal law, consulting in largest number the District Attorney and in lesser numbers other officials whom they might have heard of through the newspapers, and not going much to judges or lawyers or doctors; many of them seeking out the nooks and crannies of officialdom for a word of advice. Only 8 had heard about the Bureau from the newspapers, and only one over the radio. I was informed by the Bureau that since it operates, as do most others, without any publicity, these few instances probably occurred through some mention of the Bureau at the time of the annual community chest drive.

5. Disposition of the matters handled.

The Milwaukee Bureau, during the period studied, took action with respect to 2,526 separate matters;[43] the Stockholm Institute with respect to 15,122.

The nature of the action taken was as follows:

Litigation Suits in which action taken:	*Milwaukee*[44]	*Stockholm*
Suits *actually tried* to a conclusion	46	1,063
Suits *settled* after suit commenced	50	1,041
Suits *pending*, or other action taken	97	147
Total number	193	2,251
Disposed of solely by advice	1,060	5,674
Miscellaneous (investigation, negotiations, preparation of papers, etc.)	1,273	7,197
Totals	2,526	15,122

Stockholm Institute Handled Much More Business

This table shows that in comparison with Milwaukee, the Stockholm Institute—

handled about 6 times as many matters.
tried about 21 times as many law-suits.
settled about 20 times as many law-suits.

The Stockholm suits were not only numerous but varied in content, as the following shows:

Suits by Stockholm Institute		*Totals*	*On which side*
Marital cases:			
Separations	713		
Divorces	626		
Property questions	15		
Support (apart from divorce, separation)	56		
		1,410	(P.1,276; D.134)
Parents and children:			
Status of birth	22		
Custody (apart from divorce, separation)	33		
Care of children (outside of marriage)	251		
Miscellaneous	1		
		307	(P. 270; D. 37)
Criminal cases:			
Ill treatment	17		
Libel	3		
Robbery and theft	25		
Frauds	42		
Illegal hunting and fishing	2		
Miscellaneous	72		
		161	(P. 29; D.132)[45]
Employer-employee:			
Employment of sailors	4		

*Continued from the March number of the *Journal*, pages 215 to 220.

42. Chiefly from Madison, Wis.; see infra, note 47.

43. Including 312 litigation matters referred to the bureau's part-time attorney, but excluding 56 cases refused at first interview (client able or advised to engage private attorney) and 27 divorce cases similarly refused because a divorce was not recommended by the appropriate social agency. These exclusions are necessary to make the figures comparable with Stockholm. In the case of both Milwaukee and Sweden, the total of "matters handled" is somewhat larger than the total of "new matters" since the former includes cases from the previous year which were worked on during the current year.

44. Of the 193 Milwaukee cases, 7 consisted of matters before the Industrial Commission (only 2 of which went to hearings); 3 consisted of the filing of liens.

45. I do not understand the role of the Institute in assisting "plaintiffs" in criminal proceedings.

Servant girls' pay	24		
Employment agreements, including wages of manual laborers.	30		
Procuring testimonial of service.	1		
Claims of agents and those receiving commissions	18		
Miscellaneous	52		
		129	(P. 115; D. 14)
Accidents:			
Workmen's compensation	8		
R.R., street car, auto accidents.	84		
Others	7		
		99	(P. 66; D. 33)
Loans and other claims		72	(P. 58; D. 14)
Personal property questions:			
Installment purchases	6		
Payment for goods charged	9		
Recovery of property	6		
Others	6		
		27	(P. 17; D. 10)
Real Estate:			
Landlord and tenant	16		
Access, purchase, exchange, gift.	2		
Others	2		
		20	(P. 12; D. 8)
All others:			
Estates	8		(P. 6; D. 2)
Debts and defaults	4		(P. 2; D. 2)
Executions	4		(P. 4;)
Ejections	4		(P. 1; D. 3)
Checks and drafts	3		(P. 3)
Guardianships	2		(P. 1; D. 1)
Cases of firms and societies	1		(D. 1)
		26	
Total no. of suits in which action was taken		2,251	(P.1,860; D.391)

Plaintiffs and Defendants

We do not have a similar break-down for Milwaukee, but it is interesting to note that whereas the Stockholm Institute represented *plaintiffs* predominantly (in about 80% of the cases), the Milwaukee Bureau represented *defendants* predominantly (in about 70% of its 193 cases). This is perhaps explainable by the indigent character of the Milwaukee clients and the nature of their problems; for example, by far the largest single item brought in by the Milwaukee clients involved landlord-tenant questions, presumably on the tenant side (479 out of 2,430 clients; as compared with Stockholm's 728 out of 13,548).

The Stockholm Institute carried 95 cases (including 27 criminal cases, 15 of which were in free proceedings) to the Court of Appeal, and 10 (including 3 criminal cases, 2 of which were in free proceedings) to the Supreme Court. No appeals were taken to the Wisconsin Supreme Court from the Milwaukee courts.

Areas Served

The Stockholm Institute represented litigants in 204 cases in courts outside of Stockholm, in four different localities. The Milwaukee Bureau was limited to its own metropolitan area. In Sweden, moreover, there was a close working relationship between the several Institutes; Stockholm received 409 cases from the others and turned over 74 to them. The Milwaukee Bureau received 18 cases from other Legal Aid Societies; but the Bureau was unable to handle a like number because the matters called for work outside the city; none of these was referred to other legal aid organizations, there being only one other in the state, in Madison. (This bureau is staffed on a part-time basis by students of the University of Wisconsin Law School. The population of Madison is some 60,000;[46] the bureau handles around 300 cases a year,[47] a significant volume since (a) the bureau is excluded from acting in criminal and bankruptcy matters; (b) nearly all wage claims in Madison are handled by the State Industrial Commission;[48] and (c) with minor exceptions, the bureau does not handle a case until after *three* attorneys, called in rotation from an alphabetical list of the bar, have stated that they do not care to handle it. Here surely is persuasive evidence of the need of legal aid organization in smaller cities as in large ones.)

Classes of Business Handled

6. Nature of the matters dealt with by the Stockholm and Milwaukee organizations.

The following comparison covers the new matters, whether litigated or not, brought in to the two organizations during the year in question. Differences in classification prevent an exact comparison of all items.

	Milwaukee	*Stockholm*
Bankruptcy matters	1	97
Collections of judgments	22	246
Criminal matters	2	1,142
Divorce	60	1,083
Estates	57	1,403
Guardianships	14	200
Husband and wife (other than divorce, but including alimony questions)	257	2,480
Insurance	43	87
Landlord-tenant	479	728
Other real estate questions	106	530
Workmen's compensation	19	187
Other personal injuries	39	455
Wage questions	118	713
Questions concerning agents and employees on commission	...	376
Other questions relating to employment	...	672
	1,217	10,399
Balance variously classified	1,213	3,149
Total	2,430	13,548[49]

The balance of the Milwaukee matters consisted chiefly of "money claims," "recovery of personal property," "advice," and garnishments; there were smaller items such as "attorney and client" and "neighborhood quarrels."

Of the balance of the Stockholm matters the largest item had to do with parents and children (1,012 matters); other items reflect the broad nature of the Institute's work, a few examples being:

Water rights	6
"Business deals"	50
Checks and drafts	42
Marine law	3
"Cases relating to firms and societies"	102
"Cases relating to commercial rights"	78
Dissolution of partnerships	5
Taxes	113
Change of name	85
Citizenship	50
Poor relief	300

III. Conclusions.

Conclusions

Through the Free Legal Proceedings Act and the Public Institutes for Legal Assistance Sweden has enabled poor litigants to have their day in court, and people with small means to procure competent legal service, without expense. What significance have these experiments for us? We have moved part way in both directions; but compared with Sweden we have made scarcely a beginning. Can we learn anything

46. 57,899 according to the 1930 census.

47. Von Briesen, *Law Students do Legal Aid Work* (1939) Annals of Amer. Acad. Pol. Sci. 91.

48. See Wis. Stats. 1939, sec. 101.10(14). The services of the Commission in this respect are, for practical purposes, limited to Madison, since it has no offices elsewhere.

49. The total number of free proceedings in 1937, civil and criminal, in which the Stockholm Institute figured either as counsel or as having engaged private counsel, amounted to 1,351. The small loss of revenue from these cases must be balanced against the social gain.

from the Swedish example? To what extent might the system evolved there be adapted to our own conditions?

Legal Troubles of the Poor

1. As to poor litigants.

In 1925, as previously stated, the Committee on Legal Aid Work of this Association drafted a model act more or less along the Swedish lines, covering both the costs of trial and the assignment of counsel in civil as in criminal proceedings. No progress has been made since then. Has not the time come when we should take this draft off the shelf; dust it and reexamine it; improve it if we can; and then get back of it and press for its adoption?

There will, of course, be obstacles; but none more serious than our own inertia. It will be said that to provide poor litigants with counsel at state expense is "socialism." But we have long since accepted the principle in criminal proceedings. Is civil justice any less important than criminal justice? If we admit the principle that no man should be sent to prison without counsel to defend him, is there any less reason for permitting him to suffer a judgment against him for damages without counsel to present his case? Or to deny him the opportunity to assert a just cause because he cannot procure counsel to act for him?

The expense to the state must be considered. But the waiving of statutory costs and fees would not appreciably reduce the state's revenue, because many if not most of the cases in which relief would be granted are cases that would not be brought in the first instance if costs and fees were imposed. Supplying counsel at state expense would be a more serious matter, but the development of adequate legal aid organizations, with salaried staffs, as in Sweden, would reduce the burden; and considerable revenue for the state might be derived by charging commissions, as the draft bill of the Committee on Legal Aid proposes, against successful recoveries. Further revenue might be obtained by a moderate increase in the statutory fees and costs in litigations involving substantial sums of money. At present in nearly every state the small cases pay a wholly disproportionate share of the upkeep of the courts. As Kenneth Dayton has pointed out,[50] speaking of the New York situation in 1933:

> "The poor man, suing to recover $50 in wages, pays three-quarters of the expense of the court maintained for his benefit; the wealthier litigant in the higher courts pays roughly a tenth. But of course the discrepancy is much greater than this, because the poor man pays precisely the same fees in the municipal court for a $50 claim as a corporation for a $1,000 claim, and with no distinction whether the claim is disposed of in 15 minutes or 2 days. Hence, proportionately, the poorest litigant probably pays substantially over 100 percent of the cost of handling his case, though he is least able to bear the expense."

Small Claims Courts Not Found in Sweden

We have made some progress with small claims courts,[51] an institution not found in Sweden, but this development has made headway in only a limited number of the larger cities, and the creation of such courts will probably always be limited to communities of that type. It is imperative that we take account of the plight of poor litigants in communities which do not have a sufficient volume of small cases to justify the creation of special courts; and even where these courts exist, they are not a complete answer, partly because their jurisdiction is determined by the type and smallness of the claim rather than by the financial situation of the litigant, and partly because they do not meet the need of providing adequate legal representation. Moreover, all the same obstacles of costs and other expenses stand in the way of appeals in cases where appeals are fully warranted.

The 1925 draft bill of the Committee on Legal Aid Work represented a fundamental approach to the whole problem. Without that kind of an approach we shall make but little progress.

Legal Aid

2. As to the expansion of legal aid work.

Relieving poor suitors of the expense of litigation is only one part of the job to be done. The other part of the job is to provide those who need it with adequate representation both in and out of court. How far our legal aid bureaus fall short of this goal is apparent to everyone familiar with their work; and this may be said without in any way belittling their importance or detracting from the unselfish and increasingly active labors[52] of the many members of the bar who have helped and are helping in the work. The real question is whether private charity and volunteer effort will ever suffice to do the task which really needs to be done if justice is to be brought everywhere within the reach of all.

Swedish Institutes Have Succeeded

The Public Institutes for Legal Assistance in Sweden have substantially accomplished this task. They are based upon two principles which will not be as readily accepted here as they have been in Sweden. The first is that the responsibility of providing the needy with legal service is a responsibility of government. A considerable part of our bar will instinctively resist that conclusion. But here again, be it noted, as in the case of waiving the costs of trial and assigning counsel, we have already admitted the principle through the creation here and there of municipal legal aid bureaus. Whether undertakings of this sort should be multiplied and expanded seems to me to involve purely practical and not theoretical questions. How have the municipal bureaus actually worked as compared with those supported by charity? Are they rendering a broader service or not? Are there political difficulties in administration, and if so, are there ways of avoiding these difficulties? If continuity of municipal support is not always assured, might not state grants-in-aid as in Sweden be worth trying? And might not some measure of supervision by the state be beneficial? Would the expense be a serious factor or would it prove to be altogether trivial, as in Sweden, in comparison with the benefits rendered (less than $50,000 a year in Stockholm from the state and municipality combined—less than ten cents per person per year in the area served)?

I repeat that these are practical questions which need to be faced and seriously studied. Are we to say

50. Quoted in op. cit. supra, note 7, p. 16.
51. See ibid., pp. 34-45.
52. There has been a substantial increase in the number of bar association legal aid committees: see the latest report of the A.B.A. Committee on Legal Aid Work, supra, note 8, passim.

that society in its organized capacity is properly responsible for seeing to it that no man shall starve, or suffer disease without care, or go through life illiterate, but that there is no similar responsibility for seeing to it that no man shall be without ready access to the means of justice?

People of Small Means Need Legal Service

The second principle of the Swedish Institutes is that the legal needs of people with very small means are as serious as the needs of indigents, and should be provided for accordingly, at least in cities where the identity of the bar is lost and the mass of people are out of touch with the profession.

Only in recent years have we begun to be concerned with this problem. Our concern is partly a reflex of the depressed economic condition of the bar. We are perceiving many signs that the great low-income urban population constitutes a potential market for expanded services at reduced cost through specialization and organized, dignified and controlled advertising—in law as in other fields.[53] Those who engage in unauthorized practice and ambulance chasing have been taking advantage of this market in ways which we justly condemn. But we should consider the cause in seeking the cure. We are prone to say: many lawyers are actively helping people who can pay only a few dollars; therefore there is no problem (except to suppress the chasers and the lay agencies). This argument leaves out of account what seems now to be fairly established, namely, that (in the larger cities at least) there are a great many people in the low-income group who do not know any lawyers, who are afraid of lawyers' charges, and who do not know when they ought to consult lawyers. These are the people we ought to be reaching, for their sakes as well as ours. Four methods of approach have thus far taken shape:

Four Plans Proposed Here

(1) The bar association reference plan, involving lists of qualified practitioners willing to handle small matters, with standardized low fees for conferences and for particular types of work; a central reference office; and public information as to its availability;[54] (2) the "neighborhood law office" plan, calling for similar practitioners with similar charges, having their offices in the mass residential areas, open in the evenings as needed; the plan, the charges and the locations to be publicized, and the offices to be supervised by some agency of the bar;[55] (3) the "legal service bureau" plan, calling for a centralized office similarly publicized and supervised, staffed by salaried lawyers, and specializing in work at cost for low-income groups.[56] (Such a bureau would correspond to the Swedish Institutes except that it would handle no indigent cases and would be designed as a self-supporting project.) (4) Various proposals for reducing the high overhead costs of law practice. These proposals relate, for example, to law books, cooperative offices, improved court clerk services, the specialist-lawyer service, etc.[57] The hope is that through reduced overhead lower charges may be made possible and service expanded. The inherent costliness of our legal structure,[58] with its numerous and overlapping jurisdictions, its gigantic output of decisions, legislation and administrative orders, and its frequently antiquated and congested procedure, will impede progress in this direction; but any gains will be to the good.

Caring for Low-Income Groups

Possibly out of these four approaches—perhaps through all of them in combination—we may ultimately evolve a satisfactory system of caring for the legal needs of the low-income groups, separately and apart from a legal aid system designed for indigents. In Sweden the two systems are combined in one, through the medium of the Institutes described above. This combination has proved to be inexpensive; it is satisfactory to the bar;[59] and it has certain definite advantages. For one thing, the greater variety of work which comes from handling the matters of low-income groups as well as of paupers is bound in the long run to attract and hold the interest of a higher quality of staff. Secondly, there is not the invidious distinction which is involved in treating the wholly poor in one type of office and the near-poor in another; the nature of the equipment and the whole tone of the place is likely to be better, and to give both groups a more cordial attitude toward the bar and the administration of justice. Finally, there is brought to bear in one office a concentrated attention on the techniques of handling, and on the existing laws and procedure in relation to, all the small matters of ordinary people; and this concentration of attention should in the end lead more quickly to advances in techniques and to needed reforms than if an artificial division is made between the affairs of the poor and the near-poor.

At the very least there seems to be enough merit in the Swedish Institute plan to warrant experimentation with it in this country; not to the exclusion of the other approaches described above, but in addition to them.

Public Need Is Very Urgent

Notwithstanding the notable progress we have already made, especially in legal aid work, time runs against us. The public need is pressing with the rise of mass unemployment and the growth of low-income urban groups. Within our own ranks we face, like those in other professions and occupations, a surplus of trained older men and a steady influx of younger men seeking our way of life. That way of life, with its tradition of independence and high endeavor, is still sufficiently desirable, in the face of difficulties and in spite of warnings and admission hurdles, to attract the ablest of our youth. There is talk of quotas; but we who are wont to decry, in other connections, the policy of artificial scarcity, cannot fittingly apply that policy

53. E.g., the findings of the Connecticut survey under the auspices of the Yale Law School, reprinted in *The Economics of the Legal Profession* (manual published June, 1938 by A.B.A. Special Committee on the Economic Condition of the Bar).

54. See op. cit. supra note 53, pp. 105-108; Fisher, *Lawyer Reference Plan in Operation* (1940) 21 Chi. Bar Record 136; report (mimeographed) by Committee on Legal Clinics to A.B.A. House of Delegates Jan. 8, 1940.

55. See op. cit. supra, note 53, pp. 148-152, for the Philadelphia plan; letter from chairman Neighborhood Law Office Comm., Philadelphia Lawyers' Guild, which sponsored the plan (describing plan in operation), printed as Appendix A in report of Committee on Legal Clinics supra note 54; Phila. Record for Oct. 14, 1939, page 1, re same.

56. See, for these plans, op. cit. supra, note 53, pp. 108-133; report, note 8, supra; report by Committee on Legal Clinics supra note 54; Report of Chi. Bar Assn. Comm. on the Economics of the Legal Profession (recommending plan subsequently approved by the Assn.) in 20 Chi. Bar Record 232 (1939).

57. See op. cit. supra note 53, pp. 88-97.

58. Cf. Sweden, where the entire statutory law of the country is published (in annually revised editions) in a single volume (*Sveriges Rikes Lag*) of approximately 3,000 pages selling for about $5.25, and available in all Swedish bookshops.

59. According to the inquiries of the American consulate.

to ourselves, least of all when numbers of people are still without adequate, or any, legal service.

No doubt the economic troubles of our profession will never be fully solved till ways have been found to set the whole economy going at capacity. But in the meantime, like every other group, much can be done within the framework of our own calling. The challenge is a universal one: to pioneer new ways of expanding services and reducing costs; to utilize idle man-power and resources for the satisfaction of hitherto unappreciated needs. No harder task was ever set before our profession, and none more urgent.

[*These footnotes are for the first installment of Dean Garrison's article.*]

1. Svensk Författningssamling, 1919, N: r 367-372. An official description of this statute is given in pages 246-249 of the English edition (1938) of *Social Work and Legislation in Sweden*, prepared by the Royal Social Board (corresponding in the main to our Dept. of Labor) and published by order of the Government. I have relied exclusively on this description and the quotations which follow are from it.

2. Unless there have been recent developments, no other country except Norway has a similar provision in its laws. See *Report of the Standing Committee on Legal Aid Work* (1925) 50 A.B.A. Rep. 453.

3. As the Royal Social Board itself points out, and as was noted by the A.B.A. Committee on Legal Aid Work, supra, note 2 at p. 457.

4. The method of selecting judges is as follows: (a) The 24 judges of the highest court, the *King's Supreme Court*, are appointed by the Crown. The large number is because the court passes on questions of fact as well as law in all appeals; the court works in divisions with not more than 7 members in each. (b) There are three intermediate *Courts of Appeal*, the judges of which are appointed by the *Crown*. (c) In the Stockholm *City Court*, a court of first instance, the judges are appointed by the Crown after the city has submitted nominations based on elections. (d) The chief justices of the *City Courts* in other cities are similarly appointed, but the remaining judges (two or more per court) are elected, and the Crown has no voice. (e) In the rural communities of the provinces there are 125 circuits, each with a court of first instance presided over by a *Circuit* Judge. He is "appointed by the Crown, and there are 12 unpaid jurors to assist him, who are chosen for a period of six years by public election. . . . These jurors are no ordinary jurymen, but they deliberate with the Circuit Judge, both on questions of fact and of law. If the opinion of the court is divided the vote of the Circuit Judge is decisive, unless all the jurors present are agreed. This participation of laymen in legal administration is peculiar to Sweden and may have contributed in no small degree towards strengthening confidence in the courts." There is no similar participation by laymen in the City Courts, except that in commercial disputes "the court may be supplemented by two elected laymen who are experts in trade."—From *The Sweden Year Book*, 1938, pp. 40, 41.

5. I wish to record my indebtedness to Mr. Hallett Johnson, the Consul General, and to his staff.

6. 50 A.B.A. Rep. 451, 456. The draft was considerably more restricted in its application than the Swedish law.

7. See *Growth of Legal Aid Work in the United States* (revised edition) by Reginald Heber Smith and John S. Bradway, with introduction by Mr. Justice Roberts, (1936) Bulletin 607, U. S. Dept. of Labor, p. 18.

8. Calendar, Seventh Meeting of the House of Delegates (1940) at p. 13.

9. 63 A.B.A. Rep. 273, 275.

10. Op. cit. note 7, at p. 145.

11. 63 A.B.A. Rep. 273, 276.

12. Report of the Standing Committee on Legal Aid Work, supra, note 8 at pp. 13, 14.

13. Op. cit. note 7, at p. 77.

14. Ibid, at p. 78.

15. Ibid, at pp. 75, 76.

16. Ibid, at p. 78.

17. Ibid, at pp. 14-21.

18. Except where otherwise indicated, the information in this section has been summarized from the work cited in note 1, at pp. 246-249.

19. Sweden is divided into 25 provinces or counties, corresponding roughly to our states. Each has a governor or prefect appointed by the Crown with the advice of the cabinet, and a legislative council elected by the towns and villages. *The Sweden Year Book*, 1938, pp. 18, 19.

20. Information furnished by the American Consulate.

21. Statistics from *The Sweden Year Book*, 1938, p. 71.

22. Op. cit. supra note 7, p. 101.

23. Ibid., p. 136; op. cit. supra, note 8, pp. 17-19.

24. 63 A.B.A. Rep. 277.

25. Op. cit. supra note 7, p. 124.

26. Op. cit. supra note 1, p. 249.

27. Stockholm figures from note 21, supra; Milwaukee, U. S. census.

28. From the American Consulate.

29. Op. cit. supra, note 21, pp. 301-304.

30. Cf. the statistics for 1938 in op. cit. note 8, pp. 17-19, and for 1937 in 63 A.B.A. Rep. 280.

31. Op. cit. supra, note 7, p. 103.

32. Op. cit. supra, note 1, p. 246.

33. Stockholm handled 13,733 new cases in 1936, 13,548 in 1937; Milwaukee 2,430 in the year ending Sept. 30, 1936, and 2,691 in the subsequent year.

34. From one to three additional lawyers are temporarily employed if the work necessitates (American consulate).

35. Information obtained by American consulate.

36. The Stockholm report states: "With regard to the bookkeeping, it must be noted that each case which was fundamentally distinct has been given its own entry and number. If the same person has requested aid from the Bureau in cases that are truly distinct, these have been given separate numbers. If several persons are concerned in the same case, the various persons have been entered under the same number. Repeated inquiries relating to the same case have, of course, not been treated as new cases, but have been noted under the earlier number, even if the case was originally listed as a mere consultation." The Milwaukee Bureau uses substantially the same method.

37. Kroner have been translated into dollars at the rate of 24 cents, the prevailing exchange in 1937.

38. Information received from the Society.

39. This grant, plus the next item, equalled the cost of postage and telephones plus about one-third of the salaries.

40. Some 300 additional criminal cases were handled by "private lawyers engaged by the Institute" who were, however, apparently compensated entirely by the clients. I do not clearly understand the role of the Institute in criminal cases. As will be seen, however, these cases constitute only about 7% of the Institute's litigation.

41. Milwaukee receives no revenue from commissions; Stockholm received commissions in only 230 out of 15,122 matters handled during the year.

PRACTISING LAW INSTITUTE REPORTS PROGRESS

DURING 1939 the Practising Law Institute of New York City conducted a spring and fall semester, as well as a summer session of its courses for lawyers in the city, with a total enrollment of 1,101 members of the bar, (as compared with 816 in 1938). During 1939 the Institute conducted 1,108 hours of lectures, (as against 749 hours in the previous year). The Institute conducted nineteen different courses, and a total of thirty-seven classes. Each course consisted of ten or more sessions of two hours each. During the year there was a total of 98 lecturers at the courses in New York City, of whom 54 were practicing attorneys, 14 were lawyers active in government service, 2 were law school teachers. Twenty-eight non-lawyers lectured, of whom 5 were accountants, 4 physicians, 5 economists and 14 experts in other non-legal fields.

The Institute's courses are made available to lawyers throughout the nation through an intensive two weeks summer session, which was attended in 1939 by 124 lawyers, who came from 21 different jurisdictions as distant from New York as Nevada, Florida and Texas. Eighty-five per cent of the lawyers attending the summer session had been in practice five years or more, and 35 per cent of those attending had practiced fifteen years or more.

ADMINISTRATIVE LAW BILL—MINORITY REPORT OF HOUSE COMMITTEE

CONGRESSMAN EMANUEL CELLER of New York, the ranking Democratic member of the Committee on the Judiciary of the House of Representatives, on February 21, 1940, filed a Minority Report in opposition to the bill dealing with administrative procedure of Federal agencies, generally known as the Logan-Walter bill.

The following is a condensation of his Report:

Some time ago, the President authorized the Attorney General to appoint a committee to study the subject. Before this Committee reported, however, action was taken by the House and the Senate Judiciary Committees. This is unfortunate.

When the vast number and widely varying characteristics of the many agencies are considered, it becomes clear that they ought not to be dealt with then in an omnibus fashion.

The bill seeks to lay all bureaus over a sort of Procrustean bed. Yet certain procedures for review that have existed in the departments for years, and which have proven to be satisfactory, should not "go with the wind."

The Logan-Walter bill proposes to subject to the same procedure all operations of all executive departments and administrative agencies of the Government, both in respect to matters of a quasi-judicial character and matters of a purely administrative nature.

Section 2 (a) provides that rules shall be issued by each agency only after notice and public hearings. This would seriously retard and hamper the processes of Government. Many types of rules and regulations are not suitable for public hearings: for example, Army, Navy, and postal regulations.

Section 3 of the bill contains an unprecedented provision conferring upon the United States Court of Appeals for the District of Columbia jurisdiction to determine whether any rule is unconstitutional or violative of a statute. The fallacy of this provision is that it contemplates a judicial review abstractly and not in connection with a specific case. Such a proposal is contrary to our basic concepts of the judicial process.

Moreover, the Government service would be in danger of demoralization as a result of such a privilege. Should every member of the military or naval personnel be accorded the right to challenge the Army and Navy regulations? Should employees be permitted to secure a court review of regulations relating to internal discipline?

Section 4 of the bill would prescribe a uniform procedure to be followed by all executive departments and administrative agencies. Yet many of the statutes conferring specific regulatory authority on the various Government offices, provide a procedure to be followed by such agency. Is it intended to repeal with a stroke of the pen all such provisions?

Another difficulty is found in the attempt to prescribe a uniform procedure for all Government agencies. Their functions and duties vary widely. There are many proceedings of a quasi-judicial character. Many others are of a purely executive or administrative nature.

Acme

HON. EMANUEL CELLER

Section 4 of the bill would require each agency to create intra-agency boards of review.

It is probable that the framers of the bill had in mind that matters of a quasi-judicial character should be reviewed by such boards. The bill, however, is not limited to such cases.

For example, the award of a contract, matters involving personnel, and other purely administrative matters would be subject to an appeal to a board.

The bill would result in demoralizing Government departments, destroying their efficiency, delaying the transaction of Government business to an excessive and intolerable degree, and greatly enhancing the cost of government.

Section 5 of the bill provides for reviews either in the Court of Appeals for the District of Columbia or in the appropriate circuit court of appeals. Yet special statutes creating various agencies contain provisions for court review of certain actions of such bodies. The systematic and methodical course to be followed in the event that any of these court review provisions are inadequate would be to amend the specific statutes.

Under the bill, however, every action, no matter how

AMERICAN LAW INSTITUTE—WASHINGTON MEETING IN MAY—EVIDENCE: YOUTH AND CRIME

AT the recent meeting of the Council of the American Law Institute on February 21-23 in New York City, the members, besides considering drafts of portions of the Restatement of Suretyship and Property, discussed drafts of some eighty sections of a Model Code of Evidence and two Model Acts relating to Criminal Justice: one a statewide act creating a Youth Correction Authority for the treatment of youths between 16 and 21 convicted of crime; the other, an Act establishing a court for large urban and metropolitan centers.

The Evidence rules cover all that portion of the Evidence Code relating to witnesses.

Both the draft of the Youth Correction Authority Act and the draft pertaining to the Code of Evidence were, after full discussion and some amendment, submitted by the Council of the Institute to the annual meeting which will take place at the Mayflower Hotel, Washington on May 16-18. Lack of sufficient time for full discussion caused the Council to refer the Youth Court Act to its Executive Committee.

The work on the Code of Evidence was begun in January, 1939 and will probably take two more years to complete. The work in the field of Criminal Justice—Youth, of which the proposed Youth Correction Authority Act is the first completed product, was begun two years ago as the result of the recommendation of the Institute's Advisory Committee in Criminal Justice, that it was in those matters which affect the detention, trial and after conviction treatment of youths above 16 and under 21 that the Institute could do necessary and useful work.

The Institute's Criminal Justice Advisory Committee is composed of some twenty judges, practicing lawyers and law professors, psychiatrists, sociologists and those experienced in the administration of penal institutions. Likewise, the smaller group which have been working on the preliminary drafts of the Model Acts presented to the Council represent a similar group of lawyers and non-lawyers each bringing his own contribution to the solution of this youth correction problem; the mixed composition of the group being a recognition on the part of the Institute of the fact that, while the legal profession has an important contribution to make to the solution of the problem of the treatment of convicted youths, it cannot be solved without the aid of those whose studies and life experiences give them a knowledge of criminal behavior characteristics.

Phillips Studio

HON. GEORGE WHARTON PEPPER
President of the American Law Institute

The Institute has taken up the task of trying to help solve at least one important problem in the youth crime field: the treatment of youth caught in the toils of the law, because of the serious nature of the consequences of defects in much of our existing system. Some of the consequences of those defects are being vividly shown in the series of educational broadcasts now being given each Monday evening under the auspices of the Institute and the National Broadcasting Company.

Mr. Celler's Report (*Continued from page* 298)

minor or insignificant in character, of any executive department or administrative agency, would be subject to judicial review. Personnel matters and the awarding of contracts by a Government department, for example, would be subject to court review. This would likewise be true of the granting or withholding of compensation or hospitalization to a veteran, or a change in rating of disability of a veteran by the Veteran's Administration. Fraud orders of the Post Office Department, the denial of an application for an immigration visa, rulings of the Department of Labor under the Walsh-Healey Act, matters of military and naval discipline, the granting or withholding of a license for a boat or of a master's or mate's ticket by a steamboat inspector, the determination of claims for benefits under the Social Security Act, and claims for pensions under the Railroad Retirement Act, constitute a few random examples of the thousands of actions that would be subject to judicial review.

The courts would be swamped and the control of the executive branch would be transferred to the judiciary. The undesirable results would be aggravated by enlargement of the scope of appellate review from that now prevailing. The general rule is that the findings of fact of administrative bodies and officers will not be reviewed if supported by substantial evidence. Section 5 (a) would permit the courts to review the weight of evidence.

The report urges, in view of all the foregoing considerations, that the legislation should not be enacted.

ON READING AND USING THE NEW JURISPRUDENCE*

Jurisprudence Again Becoming Part of Lawyer's Practical Equipment—Older Legal Philosophy Had its Homely and Effective Virtues, but also Some Defects—Rules that Give Freedom to Judges and Rules that Restrict—Doctrines *versus* Judicial Skills—"Justice Under Law" a Slogan that has been Misunderstood—"Laws and Not Men": Doctrine Examined—Reaching a Just Outcome and Staying Within the Prevailing Law—Modern Books on Jurisprudence

By Karl N. Llewellyn†
Betts Professor of Jurisprudence, Columbia University

WHEN discussion of leading writers on Jurisprudence is found referring equally to their books or articles and to their opinions laying down doctrine for the Supreme Court of the United States,[1] there is reason for feeling that the long-standing exile of Jurisprudence into the duskier and dustier portions of the libraries may have come to an end. When two of the most discussed modern writers occupy strategic policy-shaping positions in Washington,[2] and an American Bar Association report on that vital question, Administrative Law, is made up and rested in major part upon jurisprudential material,[3] and decisions such as the Sunburst Oil Case,[4] or *Erie R. R. v. Tompkins*[5] turn flatly on answers to such jurisprudential questions as the essential nature of our common law or of our judicial law-making, then there is reason to feel that Jurisprudence is again becoming part of the practicing lawyer's necessary practical equipment. When skilful practitioners report that critical study of modern jurisprudential writing (as distinct from either the plain swallowing of it, or its plain neglect) gives them useful and effective leads on building briefs,[6] and a bar association finds it useful to have put in a three-session meeting on working the theory of precedent into more communicable shape,[7] then it appears probable that modern thought in the field is beginning to pass beyond the stage of groping into that of grasping.

At least, that some of it is. For it would be a hardy jurisprude who would recommend, indiscriminately, all writings that may have been appearing in the field or under the label of jurisprudence; or indeed who would recommend everything in anything which has appeared (except perhaps the products of his personal pen). The truth is that jurisprudential writing contains, as most writing does—including texts on straight law—its proper human proportion of twaddle, misconception and exaggeration. Indeed, I fear the truth is that the jurisprudential writing of the last ten years may contain a bit more than its proper human proportion of these, for it has been a literature of groping, of half-discovery, and of controversy, and of all of these together; which means that it contains blind leads, exaggerations, waste motion. Yet it contains also sap, health, light. It is a lively literature and a zestful one; it rings with a small boy's enthusiasms, with his "See what I found!", with his shouts of "You're another!", with his swift and sometimes aimless fisticuffs. It has, in a word, more life than form. But it has been growing up fast, its formlessness is assuming shape and usability, its enthusiasms are weeding out, it is settling down to its job, it is a youngster who has ceased to be merely obstreperous or merely promising, it has become a young fellow who is taking hold and whose work needs to be followed.

This paper is an effort to set out the scheme of growth which underlies what has seemed like a welter, but has been in fact a development; to focus the vital and practical issues not in terms of the unwise things which have been written, but of the constantly building core of vision and accomplishment. It is an effort to see recent jurisprudential writing as one would see a body of "confused" case-law, disregarding the untenable extremes, the wilder misformulations; hunting, instead, for solid central stuff, distinguishing *dictum* and *obiter*, repudiating any announced *ratio decidendi* which proves to have been ill-advised and to have won no following; searching for the true issues and the true guiding principles which can help to advance the ball, and around which the bulk of the work has some-

*By mutual agreement, this paper is appearing simultaneously in the *Columbia Law Review*.

†To the thoughtful criticism and illuminating stimulus of my colleague, Elliott Cheatham, this paper owes more than I find it easy to express.

1. As holds not only of Holmes and Cardozo, but also of Brandeis, Hughes, Stone, Frankfurter, Douglas; and as was earlier the case with, e. g., Story.

2. Jerome Frank and Thurman Arnold, discussed infra; one can remind of Landis and Douglas. The phenomenon, though on the increase, is not purely recent: Wigmore, e. g., was important in the Judge Advocate General's office in the last war; Pound was an influential member of the Wickersham Commission; in both cases, views on jurisprudential matters demonstrably influenced their work.

3. Proceedings A.B.A., 1938, p. 155, 331.

4. *Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, (1932) 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360. This opinion of Cardozo's is fraught with destiny. Yet how glacially slow the movement of ideas can be is evidenced by a wait of six years before the first State court starts on the new path; see 23 J. Am. Jud. Socy. 32 (1939).

5. *Erie Railroad Co.* v. *Tompkins*, (1938) 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

6. On this I suspect that any active writer's correspondence will show the same picture as my own: rather frequent responses ranging over the past decade from dominantly indignant protest to dominantly active participation in inquiry.

7. Conference organized by Cincinnati Bar Association under the auspices of the Ohio State Bar Association, February 17, 1940, at Cincinnati.

how grouped itself by native common law juristic intuition.

The Older Jurisprudence

The older jurisprudence which is current among lawyers is one which the profession did not have occasion to study particularly; a lawyer just absorbed it, largely through the fingers and the pores, as he went along. It was, and is, in essence, the homely and effective philosophy of active men about their work. And it has the solid virtues which are commonly a part of any going, working institution. The going, working institution which the philosophy seeks to reflect is not merely our rules of law, but the whole scheme of our law, our courts, our lawyers, and their work; it includes our ways of work, and the goals toward which our rules of law drive, as well as rules of law themselves. At the heart and core of that institution lies the fact that judges, and administrative officials who do not happen to be judges, are not free to do what they choose or to decide as they choose; that their action in matters which concern the rest of us is circumscribed and limited, and is guided by something independent of the individual preferenes or vagaries of the judges and officials. That is a fact, it is an observable fact, it is a vital fact. In addition to that fact there is laid down in our legal system a judgment of policy, powerfully express and even more powerfully implicit. This judgment is that it is good and right that our judges and other officials should not be free to act and decide as they happen to please. The policy is one which is very dear to us; and it is a policy which needs constant vigilance lest officials, or indeed judges, overlook it. The older jurisprudence proceeded, in consequence, to give us a rationale or doctrine which was intended to express both the fact and the policy, and which was intended to make future facts conform to the policy. In its less sophisticated form the doctrine runs that "this is a government of law *and not* of men," and that "the rules of law determine the right decision."

As will appear in a moment, this particular phrasing of rationale or doctrine, while useful, is yet exceedingly inadequate. It wraps its words around half of the truth, and that is good; but it is also so phrased as to obscure the other half of the truth, which is not good at all. Regardless of their exactness or adequacy of phrasing, however, these particular formulations of the older jurisprudence have a value in men's minds, and more particularly in the minds of lawyers. They have a fighting value. They are prized, they will be fought for, they will be defended from any challenge at all, because they have (without our quite knowing how) come to symbolize and almost to embody the great and essential truth that judges are not free, nor are administrative officials. Indeed these particular formulations have come to appear to most of us (without our thinking particularly about how this has happened) as the *sole* established and available means to keep our officials and our judges reminded of our vital need that judges and officials shall not be free to decide and do as they just happen to please.

We cannot leave our judges or officials wholly free, or let them utterly loose, without chaos; that is clear. We cannot hold them down and direct them, without proper institutional machinery for holding them down and directing them; and that is clear. So much is common ground among all responsible jurisprudes, new or old. What the newer jurisprudes are worrying over is how to find a better, a more effective, a more reliable machinery for directing judges and other officials than the older rationale and doctrine have managed to give us.

Its Sturdy Virtues and Its Defects

For the older doctrine has not only the sturdy virtues which commonly inhere in the active man's philosophy of a going scheme of things; it has also the defects which commonly inhere in any unstudied and haphazard wisdom about a very complex human institution. Unstudied and haphazard wisdom on the lips of active men is commonly partial, it is commonly self-inconsistent, it commonly needs to have its various and variant partial expressions put down side by side, and thought through all together. The folk saws about marriage, for instance, are almost all of them rooted in deep truth—such as that man was not meant to live alone, and that marriage is a battle, and that a good woman is a pearl above price, and that it takes two to make a marriage, and that two are not enough. The trouble is that no single one of such going expressions gets its words around the whole, or even an adequate part, of the truth. Similarly, the older Jurisprudence has wrestled from time to time with certain inadequacies of the two major doctrinal formulations which have been mentioned—inadequacies which affect not only full description of the actual working of our legal system but also the full expression of our legal system's judgment on what is right, needed, and established policy. Thus akin to the saws of marriage there run saws of law: "Hard cases make bad law" means that in our going scheme judges pay attention to the justice of the individual case, but that they probably shouldn't, quite as much as they do. "Bad law makes hard cases" means that rules have a function beyond certainty, and that we do not like it and judges probably ought to do something about it, when the rules are merely certain and are not also just. "The law looks not to the form, but to the substance" means that courts do and should have one sharp eye out for what they see as effective justice in the case in hand, despite all building and reliance which may have rested on the rules of law. All of these expressions mean that in our system as we have it, the judge or other official does, to some (unspecified) extent, and should, to some (equally unspecified) extent, operate in ways not clearly laid down in the explicit rules of law. So that even lawyers who were troubled when Holmes stated that "General propositions do not decide concrete cases" watch judicial appointments or elections with concern because, apart from the question of character or bias, they know that the question of skill and temperament in the individual judge makes a difference both to decision and to law.

Doctrine of "Laws, Not Men"

All of this plainly calls for some qualification on "a government" of laws *"and not* of men." Cardozo found the interaction of "stability and change" in judge-made law to be a "paradox"; he saw the presence of change, and he valued it; he felt a judicial mandate to further it but within the proper limits. Exactly what the proper limits are he did not describe; he *felt* them, and then used them. What they are, you gather not from his books; those books tell you chiefly that there is some freedom for a judge, and that it is

severely restricted.[8] To find out what the freedom is, as Cardozo saw it and used it, and what the restrictions are, you have to go to Cardozo's opinions and piece the matter together for yourself.[9] Pound, again, poses as a major problem for jurisprudence—in its immediately practical bearing—the problem of marking out and guiding the interaction of "rule and discretion"; and in Pound's descriptions of that "Law" *under* which courts and other officials do move and must be made to move, we find a very considerable array of factors other than "rules".[10] These factors turn out, moreover, if one examines them, to be factors that do three things at once: (1) They help control and guide the judge or other official in ways and places in which the rules of law, as such, fail to control and guide. (2) They are factors which are given and present in the legal system as we have it, so that they can be known, felt, even seen by a lawyer, and they therefore *can* guide him both in predicting and in working out an argument to a court. (3) They are factors which afford, however, some very real degree of flexibility of adjustment both of the outcome of a particular case and of the rule laid down in a case to changing times and needs and case-situations. Such factors include the "principles" of our law, which Pound wisely sees as broader than rules, and as capable of reshaping narrower rules that fall within their scope; and the "concepts" of our law—such as "Contract," which is different in connotation from "Property" or "Tort"; such "concepts" classify a situation and thereby give it a frame of reference and tendency, and so help decide a case even if there is no rule to tell whether that case *is* one of "contract."[11] "The law of conveyances," says a court in one of the last advance sheets on my desk, "is not the law of contracts"; and the decision in the case turns, as decisions should in good part turn, on the classification which the court then makes of the situation. Such classifying is only sometimes dictated by existing rules.

Control and Freedom of Judges

What has been said can perhaps be summed up thus: the fact that judges and officials are not wholly free and must not be wholly free, divides on analysis and closer examination into two facts. The one fact is concerned with the control, the restraint, the holding down, of judges and officials; the other fact is concerned with the allowing to them of a limited degree and a limited kind of leeway, and the putting on them of a duty to exercise their uttermost skill and judgment within that leeway. Both of these facts must be seen, and both must be reckoned with, by any Jurisprudence which aims to cover the plain facts and the settled policies of our legal system. For there are two kinds of judicial or other official freedom which come in question, and the two kinds are very different. It is a fact in our legal system that judges are by no means free to be *arbitrary*, and our vital need that they shall not be free to be *arbitrary* has been caught into these rationales or doctrines about "laws and not men," and about "rules determining cases." But it is also a fact that our legal system does adjust to the individual case *and* to changes in our conditions and institutions; and that fact means that judges and other officials are free to some real degree to be *just* and *wise*, and that we have a vital need that judges and other officials shall continue to be to some real degree free to be *wise and just*. That fact happens, however, *not* to have been caught into an equally familiar, equally sharp, or equally precious rationale or doctrine. Yet it needs to be; it is no less a vital part of our legal system and of our judges' duty. There is the law, which we know as impersonal, and think of as clear; there is the right outcome, which we feel as also impersonal, and think of as hard to find, but capable of being found. And the office of the judge is to fulfill the demands of *both*, together.

Here one sees as under a microscope the essence of method and accomplishment of the newer Jurisprud-

8. That freedom is present, but severely limited, is the major theme of *The Nature of the Judicial Process* (1922), repeated in an address before N. Y. State Bar Assn., 55 N. Y. S. B. A. 263 (1932). The paradox is stated, not resolved, in *Paradoxes of Legal Science* (1928).

9. The opinions reveal a judge in whom the following five characteristics are developed in almost exactly equal intensity, and in whom any one or any combination of them may in a given instance gain the ascendancy and dominate the shaping of the result—though never without all the others being perceptibly at work. (1) Sensitivity to immediate felt justice of the immediate outcome in the particular litigation. (2) Sensitivity to long-range felt policy in the line of cases and situations typified by the case in hand. (3) Sense of duty to the rules theretofore laid down by court and legislature, but rather to their substance and felt purpose than to their form. (4) Profound sense of duty of the court to shape in words some explicit guidance for the future. (5) Love of lawyer-like dialectic to a degree which, when you like it, you feel as utterly superb, and when you do not like it you feel as spiderweb sophistry, but which in any event had the capacity to honestly mislead the dialectician himself, when the safeguarding characteristics, for any reason, failed to afford it full balance. I know of no judge in whom these five attributes have been so equally balanced, in high development. Another judge, following policy, may be impatient of authority; Mansfield is the type. Or, following the justice of the case, he may be muddy of analysis, or slipshod of formulation; a typical American procedure. Or, following certainty and the rule, he may disregard the need of the case or situation; as did Parke, or our own Sanborn in commercial cases. Cardozo never does any of these things; but repeatedly he does grow over-subtle in their reconciliation.

10. For earlier passages, see The Theory of Judicial Decision, 36 Harv. L. Rev. 641, 802, 940 (1922-2); *Law and Morals* (1924) at 25.

For more recent passages, which have come to stress ever increasingly the institutional and ideal phases of our tools of legal guidance, see The Ideal Element in American Judicial Decision, 45 Harv. L. Rev. 136 (1931); The Formative Era in American Law (1938) especially Ch. III; What Is the Common Law, in *Future of the Common Law* (1937) Harvard Tercentennial Addresses, also in 4 Chi. L. Rev. 176 (1937).

11. A current illustration is found in the division of the Circuit Courts of Appeal over whether it is a refusal to "bargain collectively" to refuse to commit the results to writing. If the matter be sized up as one of Contract, a "bargain" has been achieved and completed by oral agreement, and the court has no business to presuppose bad faith. If the matter be sized up as one of effective adjustment of labor relations by collective agreement, the men bargained for are seen as needing protection against their own leaders' possible misrepresentation of results: the writing amounts to credentials of the returning emissary, and the printed copies of it to the individual's record of whatever security it gives him on the terms of his employment. Thus seen, the signed writing is a voucher for the auditors. Classification, once made, dictates flavor; and flavor makes the case require decision *its* way.

Of late years, Pound's own writing has tended to soft-pedal "concepts" and put more stress on that "relational thinking of the common law," which was developed in *The Spirit of the Common Law* (1921). What this means is that the sharper study of the concept "concepts" by such writers as Cook drove Pound into discomfort in the use of that term; but he had never used "concepts" to mean ideas with clear edges; he had been reaching (and very wisely) for expression of the shaping and dynamic character of the *given classifications*, and for the common *ways* of making classifications around dynamic situations.

The shaping effect of context on decision, produced by classifying, is beautifully brought out in Arnold's books, if one can forget the political purpose of his illustrations.

ence. The method is to take accepted doctrine, and check its words against its results, in the particular as in the large. The method is to attempt to take a fresh look, and a sustained, careful look, at what goes on. The method is then to try to keep all the relevant results in mind at once, to see whether Tuesday's results check with Monday's, and Wednesday's with either; and to be content with no formulation which does not account for *all* of the results. That is the first part of the method. The second part of the method, if the accepted doctrine does not seem to wholly square with all of the results, is to attempt another fresh look, from some other angles: If a doctrine does not do all that it purports to do, then why do people cling to it so hard? If a doctrine does not, in and by itself, do all that it purports to do, then *what else* is at work helping the doctrine out? For there is something else at work, helping all doctrines out. There is the tradition of the judge's craft, stabilizing the work of our judges, and guiding it; and there are the ideals of that craft, which also stabilize and guide. Is this *something else* something wholly ineffable or spiritual or personal, so much so as to yield nothing at all to careful study, so much so as to lay no foundation for more effective doctrine which can get closer to really doing what the doctrine we have is supposed to be doing? The idea underlying modern Jurisprudence is that harder and more intensive study of what goes on, and harder and above all more sustained study of the wisdoms and part-wisdoms in the books, checking them again and again against what goes on, can lay the foundation for more solid doctrine. On the particular matter of judging, the newer Jurisprudence is persuaded that the older, by putting on the doctrines of law more weight than those doctrines do bear or can bear alone, had put too little weight on the *art and craft of the judge's office*. One studies that art and craft by studying particular officers at work in their office, and seeking for the similarities in their attitudes and behavior. This has been misconceived, as being a delving into vagaries of individuals; what it is, is a search for the predictabilities and the proper lines of work in the judge's office which transcend individuality. These can be dug out only by case study.

Motive and Insight

What has been discussed seems to me an illustration of this. For it is a real gain to discover how much, in a regime of "law," we have been leaving first, to the untutored, unguided conscience of our judges, and second, to the training which they are left just to pick up. "Better a poor judge with experience than a good one who isn't broken in," runs a lawyer's saying; and that saying is not directed to the judge's conscience. But what *is* directed to the judge's conscience is the notion of not being influenced in decision by unjudicial considerations. And unjudicial considerations are not just "considerations outside the record"—though charges have been framed and sustained in those terms. They are *some kinds* of consideration outside the record, of which we can effectively name one or two, such as "bribery," but which at present we mostly know only by feeling. For there are *other kinds* of consideration outside the record whose skilful use marks our great judges: "true" insight into justice and policy, for instance, whencesoever derived. And it is a good man who at present writing can lay down the difference between "yielding to public clamor or political power," on the one hand, and "feeling and serving the demands

KARL N. LLEWELLYN

of the times for justice," on the other. About all that is yet clear on that point is that the discrimination does not turn wholly on motive, but turns also on insight, for we are not content with the steadfast blind; nor wholly on insight, regardless of motive, for neither are we content with even prophetic judgment, if it rests on fear, or favor.

What I am trying to say can be almost summed up in this: that when we take a fresh look at what really goes on, then we see before us, along with our doctrines of law, and giving to those doctrines much of their meaning, the crafts of law, and the ideals and traditions of those crafts; of which judging at trial is one, and judging on appeal is another. And that to leave unstudied and almost wholly implicit the ideals and traditions of the crafts is to leave unspoken and undiscussed half of the guidance and control and soundness which lie in our actual going legal scheme of things. So that if the newer Jurisprudence, following its basic approaches of a realistic *fresh* look at what goes on, and a *sustained* effort to account for *all* of it, can open up these crafts for communicable study, it will be offering real help.

"Justice Under Law"

Pound has attempted to combine the two phases in his slogan *"Justice under Law";* but the heart is taken out of that slogan by an unfortunate accident of phrasing in Pound's writings: the accident that he regularly and indistinguishably uses the word "Justice" to mean *either* what most men mean by Justice *or,* as the case may be, to mean the mere process of adjudication, whatever the result; so that in little, if any, of his writing does *"Justice* under Law" have any inescapable flavor of *"Attaining* the *goal* of Justice, under Law."[12]

But much more troublesome to understanding than any accident of any individual's phrasing, are the facts

12. For recent discussion, see the two items last cited. The ambiguity, or better, multiguity of the word "justice" runs throughout Pound's writings: now it means "justiciation," now "administration," now "the socially just," now "the just, as between these litigants," and again any combination of these elements. The context commonly indicates the dominant meaning; except of course on this crucial question, where exactness is necessary to getting to the juice, and only the two last-given concepts—which frequently need themselves to be distinguished—are important.

of the work and thought of lawyers at large. Lawyers think law, lawyers argue law in court. And the job of a lawyer is to show how the goal of "justice" in his case can be attained within the framework of the law. And —a point to which we shall recur in a moment, a vital point—the fact is that in a huge number of cases *there is enough leeway and give within the framework of our law* to allow of what is felt as justice being attained in the case without departing from that framework. This fact means that when a lawyer openly argues "Justice" as a major argument, instead of arguing law first and justice as showing what the "true" rule or principle or application of the law must be seen to be, then that lawyer is practically advising the court either that he has not thought the law of his case out, and made clear its bearings on his case, and so ought not to be seriously listened to; or else he is advising the court that his case really falls outside what it is proper for a court to remedy. But this means, in turn, that when a lawyer is thinking about the use and work of "law," in general and in the large, it is law-in-rules that comes to his mind, and the slogans about "decision dictated by the rule of law," and "laws and not men" loom ten times as large in his mind as even the best slogan about needed change in rules, and justice in individual cases, could hope to loom. For the very changes that he urges in actual argument are urged nine times out of ten as *already* clearly "law." It is only in the particular, when the lawyer is thinking about how to shape up some one case actually in hand, that the felt justice of his cause, the need for making the court see and feel that his client is *right*, looms large in his mind; and even then, it looms as a problem in fact, not as a problem in law.

Dealing with Only Part of the Lawyer's Problem

I wish I had the skill to make this clear. For it is simple fact that when men think consciously about a problem in its general aspects—such as the problem of what rules of law do, what effect they have on courts, what effect they ought to have, and indeed, under our legal system which works on "right rules" and "true rules," what effect they must have—it is simple fact that when men start to wrestle with such a problem, they think especially about the *parts* of that problem which are intellectually hard and intellectually articulate, about the parts which call for research and careful planning, and most especially about the parts to deal with which they must resort to books and to the definite, printed word. The rest of what goes into the problem they mostly forget, or else assume; in any event they do not talk or write about it. So that the very lawyer who is most careful about the "atmosphere" of his every case, and who most deftly works each time to make the court feel justice on his side of it, to make the court want to accept his good and solid line of legal argument and reject his adversary's line of legal argument (which really, just as legal argument, is about as good and solid as his own)—that same lawyer will be telling you next day that it was the rules which decided that case; he "simply" got the court to "see" "the true" rule and its bearing. But if he is right in this, then a less skilful lawyer entrusted with the case might have lost it; and then the "true" rule would have turned out to be a different rule, at least for that case, perhaps for the whole line of cases: "settled in this State," thereafter. Indeed, it is a rare lawyer who has lost a case who does not feel that the court in deciding against him "departed" from the "clear" rule; but he does not feel that the courts make a practice of so departing—except in the cases he loses.

With this we come to the newer lines of Jurisprudence. From this foundation we can see what they are about, how far they have gotten (and how far they have *not* gotten), the queerly and immediately practical bearings of their theory, the reasons for these lines of Jurisprudence being so widely misunderstood, and where some of their next lines of fruitful inquiry must lie.

For the basic problems to which they are addressed are these. Taking as given the two facts, first, that judges and officials are not free to be "arbitrary," and must be held down and directed; and second, that they are and must be to some extent free to be just; then, first, is the rationale and doctrine about "laws *and not* men" and about "rules deciding cases"—is that the best description we can give of how in our legal system judges and officials are in fact held down and directed? Indeed, does not our legal system itself contain some other and better machinery, some more effective, more reckonable machinery, for holding them down when they need to be held down, for leaving them free where they need to be left free, and for directing them, inside this latter area? You can put this another way. There *is* in our legal system a vital and needed measure of stability and reckonability and control. There *is* also in our legal system a vital and needed measure of give and adjustment, of development and change, and of individualization, of which the study of rules of law alone, and as they stand at any given moment, gives no adequate indication. As a practical matter it is vital for lawyers to have the best intellectual wherewithal they can get, to judge when the court is going to be governed by the one and when it is going to be governed by the other. And as a practical matter lawyers need help in making that judgment about individual and particular counselling situations, individual and particular matters of litigation. The large and the long run, the sweep of the decades, will not do the lawyer's work here. He needs in this to get down to cases. It is not enough that "the course of decision has been characteristically steady and uniform." The lawyer needs light on the particular case which will be up tomorrow. The older Jurisprudence never did get down to particular cases, on this problem.

"What the Courts Will Do," a Practical Problem

Hence, and naturally, the newer jurisprudence began just here, began as a lawyer's jurisprudence, built on worry over lawyers' needs in dealing with lawyers' problems about lawyers' individual cases: "The prophecies of what the courts will do in fact" is language addressed to the counsellor. But the newer jurisprudence, wherever it begins, cannot fulfill its mission if it stops with the counsellor—though I should hate to see it leave off its interest in his work. There follows at once an interest in law from the angle of the advocate and his work—an angle revealing, among other things, the extraordinary leeway which our legal system allows in the particular case for reaching *either* result contended for, and for reaching either of those results *"under law."* There follows then, and no less, and indeed inescapably, an interest in the judge and his work.

In that portion of the newer jurisprudence directed mainly at the counsellor's work, judges figure chiefly as officials whose prospective actions must be foreseen if possible; the figuring is in terms of probabilities; account has to be taken of the chance that a case may come up in an unfavorable setting, that it may be handled and argued abominably on one side and mag-

nificently on the other; account has to be taken of intervening factors, possibly personal to judges and utterly irrelevant to any rule of law, which a client's proper protection simply does not allow a counsellor to ignore because that counsellor (or a jurisprude) may view their presence or possible presence with concern, or with alarm, or even with disgust. It is no infatuation with the ugly or the nasty or the wrong which leads the newer jurisprudence, when studying the counsellor's work, to deal with the possible presence of official irregularity as affecting a client's realization of his rights. It is the practical need for studying how law's gears sometimes slip, in order that the slipping of law's gears may be effectively reduced. Thus even that "state of the judge's digestion" which has been the subject of considerable deprecatory comment on jurisprudes or by them[12a] is still a matter which no cautious counsellor can leave out of his reckoning; instead, he tries to stay on legal and factual ground and record so solid as to guard against any state of any judge's digestion, any death of any witness, any prejudice of any jury.

In that quite different portion of the newer jurisprudence which is directed to the work of the *advocate*, the study of judicial personality becomes not indeed the central, but certainly one central focus; for in the advocate's work not courts in general, but one particular court, or in the event of appeal, then one particular series of courts, and at one particular time, and on one particular case, is concerned. Study of particular personalities becomes essential to the advocate, and so, important for jurisprudence if it is not to ignore the facts of life. In the case of a particular judge subject to dyspepsia, the unfortunate effects of a particular ill-advised breakfast do alter the advocate's practical problem. I confess to total inability to understand why, when the subject of study is the effect of advocacy and the bearing of the advocate's work on the result of cases and the growth of law, such matters should be regarded as either unilluminating or indecent to discuss. They are not, in acute forms, too frequent of occurrence; they are not always disturbing when they do occur; they do not alter the basic importance of law and law's rules and principles. But I have yet to meet an effective advocate who did not worry over them, who did not when they crossed his path work with or against them, who did not regard as bearing on his case, its presentation, and its outcome, even such matters as that "the judge is certainly feeling good this morning." And so long as law exists not for itself and in vacuo, but to serve the people, and so long as advocates and counsellors continue to be those through whom law's results are mediated to the people, and through whom the facts are strained and shaped for the court's use in reformulation of the law for the people, just so long will it be one fair part of jurisprudence, to my mind, to study more in detail exactly how this great task of mediation is now being accomplished, in order that we may learn how to accomplish it more effectively, with less waste, and with fewer slips-ups.

Let me make plain that I have never discussed the judge's breakfast, or headache, before; I do not regard it as a peculiarly fruitful line of study. I mention it here simply to put in perspective the whole problem of the idiosyncracies of particular officials. The perspective is that elimination of things we do not like, or coping with them, is best accomplished by trying to see what they are, where, how frequent, how they operate. Then we can get at them.

Harris & Ewing

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Respect for the Judge's Work

But obviously the branch of jurisprudence which is concerned with the *judge* and the *judge's work* must see the judge in a wholly different light. A counsellor has to worry over what a judge will do, whether that doing is right or whether it is not right; right or wrong, it decides a case; right or wrong, decent or indecent, it may make or remake a rule. For a counsellor at work on counselling, what the courts *do* is thus the most important part of law; whether, I repeat, the doing is right or not. But *judges* (trial judges or appellate) cannot see law that way, nor can jurisprudes when they are working over either of the judge's functions see law that way, nor can citizens, as citizens, see law that way (though, as interested parties, they will do well to see law in fair part that way). This is not to say that the "prediction-of-official-action" way of seeing law is a bad way or a wrong way to see law; it is to say that the prediction way is an *incomplete* way to see law. Indeed, and on the other hand, it would be an incomplete way for even a judge to see law, if he should ignore this matter of what courts will do, and sometimes do wrongly; for their doing—even wrongly—is likely to make positive law which later courts have to attend to; and what an upper court will do is what determines prospective affirmance or reversal of the court below.

For all this, the branch of jurisprudence which deals with the judge and his function must center no less upon the "just" solution than upon the solution which other courts will reach, or even that which the rules of law may seem to indicate. It must center no less upon that ideal and duty of the judge's office which requires that somehow he is to arrive at a just outcome in the case before him than upon that ideal which requires that he stay within and follow the scheme of our prevailing law.

And by revealing this double job—imposed upon him by our legal system *as* a double job—by revealing this as peculiarly the job of the judge (or indeed of any responsible administrative official) the newer Jurisprudence seems to me to get the whole matter a step further toward clarity and toward guidance. When we stop talking just about "Law" in the large and what "Law"—in the vague indefiniteness of "All Law at once"—is and does, then certainty of prediction for a counsellor can stop getting all confused with good guidance for the judge, and then the judge's peculiar problems, at trial or on appeal, come into much clearer focus. The jurisprudence of advocacy makes clear that the rules of law as we have them do not alone provide certainty of prediction, or opposing counsel just could not make worthwhile arguments on two sides of the same case. The jurisprudence of advocacy thus centers attention upon the need for the judge to get some guidance and help in *choosing between two tenable lines of legal argument from the authorities. Over and above the guidance and partial control given by the rules of law which we have, there is further guidance needed.* Rules giving that further guidance—rules akin to, but deeper than, our rules on use of precedent—need articulation, and are in process of getting that articulation, and of providing the further guidance which we need. And that is a problem that does not come out of hiding for sustained and articulate and rational study until we observe that the mere rules of law, in their combination, and indeed in their language, speak to the particular case so very often with a forked tongue. Any advance the newer Jurisprudence can make along this line will rather obviously advance certainty in the results of law and further the articulate rational guidance of decision—a certainty and articulate guidance which we now have less of than we need, because of our over-emphasis on the rules of law alone as being *the* great factor, the *only* observable and recordable factor, and hence the *only* rationally manipulable factor, which controls judges—and other officials.

Further Guidance Needed

Pound has done good pioneering here, in regard to the part played by "ideal elements" in law; and by his more recent emphasis on the stabilizing force of "taught traditions"; but what these mean in detail, when one gets down to cases, lies still unexplored. Almost wholly unworked out is the reduction of these ideas and their bearings to concrete normative form for use in practice by judges and by other law-officials faced with decision under law of the particular doubtful case in hand. Indeed our rules of precedent themselves need going over, as do those for statutory construction. For any lawyer is aware that whereas we have clear and established practice, and even rules to tell, for instance, *how* to distinguish a precedent, and *how* to give even bold dictum full weight by quotation and citation of what "this court has declared," as "a true expression of the principle," we yet have no unambiguous rules at all to

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HON. THURMAN W. ARNOLD
Assistant Attorney General of the United States

tell *when* to do the one or the other or anything between or different. And the same holds as to, say, "remedial" and "strict" construction of statutes. Pound's line of initial approach to the matter is thoroughly sound: the necessary basis for better doctrine does lie in the laying out of new and more effective lines of descriptive study of the actual work of the courts with our rules of law, and within the frame of action which those rules mark out. For it is by careful and accurate description of what the courts are doing that we can see wherein existing doctrine fails to *guide* them effectively in being wise, and fails to hold down their freedom to be "arbitrary."[12a] Yet any attempted description will for the next decade need repeated testing in *detail* on particular series of cases in particular courts, so as to check up on just how good and accurate a description it may be; and above all, so as to bring out for study what else and more there may be which also needs description and comparison. Only so can the basis be laid for clearer and more unambiguous doctrine on how judges are to go about the judge's job. To date, we have left

12a. The difficulty in scientific use of any hypothesis resting on personal idiosyncrasy is to find adequate *evidence* to justify attributing any particular decision to any such factor. Guesses are of little use. But sometimes, as with Mansfield in *Stuart v. Wilkins* (see 52 Harv. L. Rev. 725, 742 ff.) a decision is so utterly out of known character as to call for some unusual factor to explain it.

much more of this to mere untutored and unguided experience than a system of Law has any business to.[12b]

The philosophy of this can be stated briefly: Legal doctrine cannot wisely attempt to achieve what is impossible of achievement. To make courts either stand still or ignore the justice of the case in hand is impossible. (It is also undesirable). Doctrine which purports to cut down all freedom of the judge or other official is therefore unserviceable doctrine. In practice, it leads to the production and use of de facto leeways which de jure are left unmentioned; and de facto but unmentioned leeways are both confusing and not subject to easy control. But to merely see this and then insist that judges—and other officials—are in fact as free to move as the *rules of law now leave* them whenever they really *want* to move; or to insist that they *ought* to use all the freedom which the rules of law now leave them —either of these things is to make doctrine fit only for the super-judges, the Mansfields and Marshalls, and not for the McWhirtles and McWhortles who, though good and solid men, do yet need guidance and may sometimes need control. To see just what we have, in the way of either control or guidance, is a job for realistic observation, observation of fact, of detailed fact, observation which cuts beneath formula, sustained observation. To see just what is needed, in control of freedom to be arbitrary, while leaving the necessary freedom to be just, is a job for such observation plus legal statesmanship. To formulate for practical use rules and principles which can help materially in accomplishing the desired gain in both certainty and justice, is a job for legal engineering. The task is not chimerical, because we know that there can be training for the art of advocacy; the Greeks accomplished that, and so did the Scholastics. We know, too, that there can be training for counselling; the offices "break men in," year by year. *Some* of the art of advocacy, *some* of the art of counselling, can be reduced to helpful rules and principles. Judging, too, is a craft and art of law. Well, then?

Problems About the Judge

The "Well, then?" is a challenge, not a performance. The newer Jurisprudence is yet far from having worked out with clarity the relation, in the judge's actual work, of the ideal and ideological elements in our legal system to the words of the rules of law, or the relation of either of these to the going institutional practices of courts and judges. That is a plain next problem for study. The newer Jurisprudence can claim to have gotten it into the clear, to be seen as a problem. That is not too much. But what there is of it, is good.

Another problem, on which a beginning has been made, is the examination of the three major aspects of the judge, and of their relations to one another in his work. He is a *human being,* and in our system he is an American. He is a *lawyer,* and in our system he is a common-lawyer. He is a *judge,* and in our system a common-law judge of the modern American type—which is very different not only from being a Continental or English judge, but also from being merely an American, or merely a lawyer, or merely an American lawyer. Some of the older Jurisprudence is written as if a judge were practically nothing but a mechanical lawyer on a bench; some of the newer reads almost as if he were nothing but a human American in a black robe. Neither of these points of view is to be simply scorned, because there are facts under each; but no such point of view, *alone,* has value as more than a reminder that certain very real factors in the picture are never to be forgotten.

With the above serving as a rough indicator of what the newer Jurisprudence started from, and of the problems it is opening for study—as well as of how far it is as yet from fulfillment of its mission—let us glance over a few of the more striking writers and see what they may thus far have contributed, and why what seems so sane a line of inquiry should have elicited so much opposition. I shall for convenience deal with a few men who have written books, though much of the best material is in articles; and I shall choose books on Jurisprudence, though much of the most telling material is in monographic papers on specific legal topics.

Books on Jurisprudence and Their Authors: Pound, Frank, Hutcheson, Arnold

Let me premise one word of caution. American jurisprudes are case-trained lawyers. Case-trained lawyers are trained to think with the middle of an idea, with its core; they have the case-law habit of using words very loosely around the edges of an idea. Their arguments are built to the issue in hand, and their dicta, if only the dicta help argue the issue in hand, can be grandly obiter, giving no indication at all of what they have any intention of standing to, when some *different* case or issue may be in hand. Our judges write law thus, and thus our jurisprudes have written jurisprudence. It makes for lively reading; it also makes for inexactitude, and it makes for very easy misconception. However, it is the way of our law, and it has been the way of most of our Jurisprudence. Holmes did it, Pound does it, practically all the newer writers do it more or less. But two things will be noted which indicate that the ball is really moving forward. One is that those writers whose practice, while phrasing their jurisprudential *rationes decidendi,* is to look the wording over with most thought to issues other than the one immediately in hand, are those who have been least attacked: the writings—and they are worth reading—of Radin, Hamilton, Fuller, and Morris Cohen have not, for example, come in for the drubbings administered to those of Carter, Pound, Frank, Hutcheson, and Arnold. The second thing is that the drubbings undertaken in the Donneybrook of Jurisprudence have almost never been undertaken upon any writer's central and basic thought, upon the good *core* of what he was either saying or trying to say, but have instead whaled the daylights out of some loose-hanging piece of the thought's verbal clothing. This happens with treble ease in Jurisprudence because there is in that field no accepted machinery of pleading to produce an issue before battle. Which again makes for a lively spectacle, as two armored and embattled knights charge clashing past each other.

(*To be concluded in the May number*)

12b. For an extremely interesting sequence on this point, see Radin, The Theory of Judicial Decision: or, How Judges Think, 11 A. B. A. J. 357 (1925); Dewey's papers cited by Patterson; Morris, *How Lawyers Think* (1937) and my review thereof, 51 Harv. L. Rev. 757 (1938); Levi, Natural Law, Precedent and Thurman Arnold, 24 Va. L. Rev. 587 (1938) Patterson in the forthcoming *The Philosopher of the Common Man* (ed. Ratner) (1940); and the forthcoming papers at the Cincinnati Bar Assn. Conference on Judicial Precedent (1940).

Support of an Integrated Bar

By CHARLES A. BEARDSLEY
President of the American Bar Association

MY attention has been called to the fact that recently a professor in one of our Universities, in discussing with his students some phase of union activities, "took a crack at lawyers," asserting that the lawyers have "the tightest little union of them all." In alleged support of this statement, he referred to the fact that in California a lawyer can be suspended from practice for failure to pay his State Bar dues.

This professor's apparent attempt to prejudice his students against lawyers, and against the organized American legal profession, would appear to be wholly lacking in justification.

Situation in California

In California, and in a score of other states, every lawyer admitted to practice in the state is a member of the "integrated bar." These integrated bars are created either by act of the Legislature or by rule adopted by the Supreme Court, or by a combination of these two methods. Every member of the integrated or state bar is required to pay annual dues. These annual dues vary in amount; in California each lawyer is required to pay to the state bar $7.50 per year. If any lawyer fails to pay these dues, he is notified of his delinquency; and, if his delinquency continues, he is suspended from practice by order of the Supreme Court. At any time during his delinquency, he can be reinstated upon paying the amount of his delinquent dues, together with a small penalty.

As far as I am advised, the professor did not indicate either how he would collect such dues if he had the power to govern the various states having integrated bars, or what objection he has to the method now in use. It seems appropriate to suggest that, instead of assuming the right to endeavor to plant in the minds of his students a prejudice against the organized bar of a score of states, because of their method of collecting state bar dues, the professor might better have suggested to these states a better method to be employed by them, if he could think of a better method, in the exercise of what is generally regarded to be a perfectly legitimate governmental power.

All Lawyers of the State Are Members

Nor does there appear to be any justification whatever for the professor's characterization of the integrated bar as "the tightest little union of them all." Even if the integrated bar could be properly called a "union," it would not be a "tight" union. I assume that, by a "tight union," the professor referred to a union that excludes all but a favored few. If he had any other thought in mind, as far as I am advised, he did not make it apparent. But any one who is at all familiar with the integrated bar knows that it does not exclude anybody—that it includes every person authorized to practice law in the particular states. The only sense in which it can be said to be "tight" is that it excludes non-lawyers.

Furthermore, the integrated bar is not a "union." The State Bar of California, to which the professor refers, is created by an act of the California Legislature. This act was passed upon the theory that the lawyers admitted to practice law in California are state officers, that their admission to practice is akin to an appointment to a public office, and that together they constitute a department of the state government. The State Bar Act provides for an effective and purely democratic self-governing organization of that department, to the end that the lawyers may be the better able to render to the public proper legal services.

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HON. WILLIAM H. WASTE
Chief Justice, Supreme Court of California

Bar Integration a Success

The following paragraph from one of our daily papers, commenting upon the California integrated bar, is typical of the attitude of the California public:

> "There are signs of new life in the California bar. It appears that the law fraternity has received a new vision of its responsibilities, new faith in its inherent goodness, renewed courage to attack its problems. It is the most hopeful sign that has come into the life of the state in over half a century."

Both the California lawyers and the California public like their integrated bar. If the University professor referred to above was fully advised as to the outstanding public service rendered by the integrated bars in various states, probably he would like them too.

INSTITUTE ON LAW OF EVIDENCE

On Friday, April 5, starting at 1:30 P. M. and continuing through Saturday, April 6, to 4:30 P. M., the Indiana University School of Law and the Indiana State Bar Association will jointly conduct an institute on "Recent Developments in the Law of Evidence." Professor Edmund M. Morgan of the Harvard School of Law will deliver the lectures. All members of the Bar of Indiana are invited to attend this institute.

JUNIOR BAR NOTES

By Joseph Harrison
Secretary of the Junior Bar Conference

THE Public Information Program of the Junior Bar Conference is now making progress in several new fields. National Director L. Stanley Ford, Hackensack, N. J., has announced that several of the much-needed scrips for radio broadcasts have been completed and are ready for distribution. The scripts cover such subjects as the need and purpose of law, the constructive aspects of law, and the duties and relationship of the layman to the law. They were prepared by Mr. Kirk Jeffrey and Mr. Van Woodward as part of the project of making available a number of radio scripts to state and local directors of the Program in carrying fundamental information to the lay public on important matters concerning the administration of justice, American citizenship and kindred subjects within the scope of this activity of the Conference. These scripts are to be used in addition to those prepared locally for particular uses within each state.

Mr. Ford advises: "They are designed for the forum type of broadcast using three persons, two of whom could be members of the Public Information Program and one an older lawyer or judge besides the station announcer." State and local directors may secure this material upon request from the Chicago office of the American Bar Association. For the present, at least, these scripts will be available only to those connected with the Public Information Program of the Junior Bar Conference.

Long Strides in Texas

From Texas comes the welcome news that arrangements have been made for a series of nine weekly broadcasts beginning April 6th and ending June 1st. Mr. William B. Carssow, Conference Chairman for Texas, has had excellent cooperation from local station directors and from Mr. Forrest Clough, educational director of the Texas State Network, over which the Conference programs will be broadcast. The plans call for nine fifteen minute broadcasts from 8:30-8:45 p. m. Scripts have been prepared by Texas members of the Conference's Public Information Program. If the first series proves successful arrangements are under way to resume it in the Fall.

Activity in Tennessee

Both the American Citizenship work and the Public Information Program of the American Bar Association's Junior Bar Conference have received impetus in Tennessee through the activities of Mr. Benjamin Z. Tabb, of Chattanooga, local director of the Program. Through his efforts, the Conference has been credited with cooperating with the American Legion and other organizations in sponsoring appropriate patriotic ceremonies in the local schools. These recently included a joint flag presentation to the Normal Park School of Chattanooga. Mr. Tabb has also delivered several addresses before schools and women's clubs as part of the Public Information Program.

State of Washington Activities

In the northwest, Washington State Chairman George T. Nickell, Edward B. Hanley, Jr. and Alfred J. Westberg, all of Seattle, are organizing local Public Information directors to carry on the Program in the municipalities of that state. Five local directors have been appointed to date. The general program of the Conference is being given momentum with the aid of bar bulletins appearing in the "Daily Journal of Commerce" of Seattle. In the columns of this daily ample space has been given to the scope, purposes and opportunities of the Junior Bar Conference. These signs of activity are most encouraging in a state that heretofore has been among the less active units of the Conference.

Regional Meeting at Atlanta

A regional meeting of Junior Bar executives was held at Atlanta, Ga., on February 17, 1940. Council members, Lewis F. Powell, Jr. and Ralph R. Quillian and Messrs. Lawrence Dumas, Jr., J. L. Lazonby, Edward A. Dutton, Ben Scott Whaley and Egbert L. Haywood, Conference state chairmen respectively for Alabama, Florida, Georgia, South Carolina and North Carolina, Messrs. Edwin L. Sterne, E. Dixie Beggs, Jr., Baya M. Harrison, Jr., Julian F. Corish, John H. Anderson, Jr., and other members of national and state Conference committees and workers were in attendance. The meeting was one of a series of such gatherings which the Conference Committee on Cooperation with Junior Bar Groups under the chairmanship of Philip H. Lewis, of Topeka, Kan., has sponsored this year. This meeting, as the others, was held in conjunction with a regional meeting organized by the Association's Section on Bar Organization Activities.

Charleston, South Carolina

En route to this meeting Mr. Powell attended a luncheon meeting at Charleston, S. C., at which a number of the younger members of the bar were in attendance. State Chairman Whaley arranged the meeting which was presided over by Mr. George Buist, member of the Board of Governors of the American Bar Association. The object of Mr. Powell's visit and of the luncheon was to aid in stimulating Conference activity in South Carolina. Mr. Powell reports: "It was a pleasant and enthusiastic meeting and the group unanimously voted to inaugurate the Public Information Program in Charleston this Spring."

Institute in Vermont

The Vermont Junior Bar Conference, with Osmer C. Fitts as Chairman, held its fourth legal institute of the year at Burlington on Saturday, February 24th. The timely subject of Federal Income Taxes—Personal, Corporate and Trust, was discussed by Messrs. Henry H. Riordon and John W. Gaynor from the office of the U. S. Collector of Internal Revenue at Burlington. At the dinner held that night, Dr. Clarence H. Beecher, of the faculty of the University of Vermont and a physician in active practice, gave an address on "The Medical Witness from the Doctor's Viewpoint." Judge Aaron H. Grout, of the Burlington Municipal Court and former Secretary of State of Vermont, spoke on the "Challenge of the Younger Lawyers in Purging the Unfit from their own Ranks."

(*Continued on page* 317)

REGIONAL CONFERENCE AT LOUISVILLE

Bar Association Executives of Ohio, Kentucky and Tennessee Meet—Many Timely Subjects Discussed

AN all-day conference, beginning at 9:30 A. M., of bar association executives, under the auspices of the Section of Bar Association Activities of the American Bar Association, was held at the Brown Hotel, Louisville, Ky., Saturday, January 27th, 1940. The conference was for Ohio, Western Pennsylvania, West Virginia, Tennessee and Kentucky, although there was no one present from Western Pennsylvania or West Virginia. Raymer F. Maguire, of Orlando, Fla., Chairman of the Section, presided. There were about fifty in attendance, all of whom were entertained at lunch by the Kentucky State Bar Association, the President of which, Judge Lafon Allen, of Louisville, had acted as chairman of the committee on local arrangements, together with Thos. A. Ballantine, President of the Louisville Bar Association; Baldwin C. Burnam, of Louisville, Kentucky, Chairman of the Junior Bar Conference; and Frank M. Drake, State Delegate from Kentucky. Mr. Phil. H. Lewis, of Topeka, Kansas, Chairman of the Committee on Co-operation with Junior Bar Groups, representing the Junior Bar Conference of the American Bar Association, acted as Chairman of the Junior Bar Conference which conducted a separate meeting during the morning.

The meeting was opened by a statement of the method of bar organization in each of the states represented.

States Outline Their Bar Organization

Kentucky—Judge Allen briefly explained the integrated bar of Kentucky, which is organized (pursuant to legislative sanction) under the control of the Court of Appeals, with the Board of Bar Commissioners as the governing body, two members of this Board being elected for staggered terms of two years from each of the seven appellate districts in the state. The Board has full disciplinary power, with hearings conducted, at the place of residence of the accused, by two Commissioners residing in other districts: the recommendations of the Board upon such record are subject to review by the Court of Appeals, which has found itself almost uniformly in agreement with the Board. Other activities of the integrated bar have been the revision of the Kentucky Statutes which is now in progress; the shaping of legislative programs of interest to the courts and the bar; the handling of public relations; the stimulation of increased interest in bar organization activities; and the publication of a quarterly journal. Membership in the integrated bar is an essential of a license to practice; and the dues fixed by the Legislature are $3 per year. There are about 2800 members. The annual meeting of the Association takes place during the Easter vacation of the Court of Appeals, and the Board of Commissioners, through quarterly meetings, functions throughout the year. The Commissioners are elected by mail ballot of lawyers in the respective districts; and the Commissioners elect the officers of the Association.

Ohio—President Gerritt J. Fredriks of the Ohio State Bar Association stated that this voluntary organization is celebrating its sixtieth anniversary this year. It has a central office at Columbus, in charge of Secretary J. L. W. Henney; membership dues $8 a year. There are about 4800 members, with meetings in April and October. The President is elected at the annual meeting by nomination from the floor, and nine Vice-Presidents are elected from appellate districts, with an Executive Committee for a term of three years. Integration has been a subject of discussion for some years past and is now being submitted to the bar of the state on a referendum to integrate under Supreme Court order. An active campaign is being conducted both for and against integration.

Tennessee—President John T. Shea of the Tennessee Bar Association, a voluntary organization, stated that it is organized on the basis of the three legally recognized divisions of the state (Eastern, Middle and Western), with the President of the Association elected by the entire membership, and with a Vice-President for each division; the governing body being a Central Council, which meets at least three times a year.

Bar Examinations

The first subject brought up by the Chairman for discussion was "Bar Examiners, Law Schools and Bar Associations," with Mr. J. J. Danhof, Detroit (Committee on Co-operation with the American Bar Association), leading. He stated that the purpose of his Committee is to raise standards of those seeking admission, and standards of administration. The preparation of questions on bar examination was discussed, with emphasis on the advisability of dealing with general rather than statutory law; and appreciation of the fine co-operation from state universities and local law schools was expressed. Progress has been made with the night law schools, and it was thought it should be possible to bring many such schools up to the required standards. During recent years qualification for admission in Michigan has been tightened up, so that the number of law students in Detroit has been reduced from a thousand to less than four hundred. Mr. J. L. W. Henney, of Columbus (Secretary of the Ohio Bar Association), stated that in Ohio a prospective law student must register, and a questionnaire is sent by the Clerk of the Supreme Court to the local bar association to secure information as to qualifications of the applicant. After studying law for three years in a day school or four years in a night school, another questionnaire is sent to the local association, which reports to the Supreme Court on the applicant's then fitness and qualification. Mr. A. V. Abernethy, of Cleveland (Secretary of the Cleveland Bar Association), further explained such activities in Cleveland, which are under a special committee. Mr. Howard L. Barkdull, of Cleveland (former President Ohio Bar Association and Ohio Bar Association Delegate to the American Bar Association) spoke on the overcrowding of the legal profession and the necessity to seriously consider the problem of reducing the num-

ber coming into the profession by raising requirements for admission.

Public Relations

The next subject was "Publicity and Public Relations." Frank M. Drake, of Louisville (State Delegate from Kentucky), stated that he felt there was no problem of this kind in Kentucky for the reason that the bar, the press and the public worked pretty well together; although not getting everything desired from the Legislature, there is no conflict and fair consideration is given to whatever is presented by the Association. Cordial relations exist between the bar and the press, both metropolitan and rural. [Note: This is evidenced by the character of publicity which the Regional Conference received in the Louisville papers.] Judge Allen called attention to a series of radio programs put on by the Junior Bar in Louisville, in which there was a round table discussion between two prominent laymen and a lawyer. The time for these programs was donated by Station WAVE, which encouraged the continuance of the program. Mr. Ballantine stated that the Louisville Bar Association officials did not agree as to the wisdom of this program, which resulted in the Junior Bar Conference taking charge of it. He also stated that it is his belief that there are indirect attacks being made on the position of the bar which should be actively met in some manner in order to avoid a future disruption of the cordial relations now existing. Mr. Fredriks referred to a series of articles carried in the *Cincinnati Times-Star* every day for several months, setting forth the need of legal services, and also mentioned a series of radio debates. Mr. Shea spoke of the cordial relations between the bar and public officials in Tennessee; he was of the opinion that radio talks by lawyers had not been very effective. Mr. Maguire described a serious situation in Florida growing out of adverse press comment on bank liquidation fees, which situation was considerably ameliorated by bar association activities. Mr. Maguire particularly stressed the assistance which may be obtained from Mr. Giles J. Patterson, Jacksonville, Fla. (Chairman of Committee of the American Bar Association on Co-operation Between Press, Radio and Bar), in working out problems of public relations. George J. Gould of Toledo (Secretary of the Toledo Bar Association) expressed the opinion that a good Grievance Committee and an active Speakers' Bureau are the best ways to inform public opinion. Mr. Barkdull stated that a program of radio addresses (with free time furnished) on legal subjects had been well received in Cleveland, and Mr. Maguire referred to a similar program every Sunday afternoon for three years in Florida.

Bar Publications

The next subject was "Bar Association Publications." Mr. Henney explained the weekly publication of the Ohio Association, which publishes opinions of the Supreme Court and Courts of Appeal. Mr. E. H. Smith, Glasgow, Ky. (Editor *Kentucky Bar Journal*), commented on this quarterly publication, emphasizing the large amount of personal news of the profession contained therein, this news being secured from a clipping service in Indianapolis. The *Journal* keeps the bar in touch with the activities of the Board of Commissioners and also carries articles on subjects of interest prepared by Kentucky lawyers. Mr. Chas. S. Adams, of Covington, Ky. (member of the Board of Commissioners), stated the greatest problem with the *Kentucky Bar Association Journal* is the expense of publication and lack of advertising. Those in attendance were much amused at his statement that the financial problem could be entirely eliminated if the *Journal* would accept liquor advertising, but that the Board of Commissioners had so far declined to accept it.

The next topic was "Justice for the Poor." Mr. James J. Robinson, of Bloomington, Ind. (teacher in the University of Indiana Law School and Chairman of the American Bar Association Criminal Law Section), stated that he thought it was unfortunate that attention should be so focused on matters like the Hines and Manton prosecutions, so as to obscure the problems of the inferior courts where the humble citizen's rights are adjudicated. The Criminal Law Section is working on an exhaustive report on the practical administration of the criminal law, with particular emphasis on its administration in the inferior courts, and the provision of efficient representation for persons appearing before them and the reduction of costs therein. By a chart which he exhibited, giving a "blue-print" of complete court organization, Mr. Robinson presented a striking illustration of the field for bar organization activities in this work which affects such a large number of citizens who are at present getting a misconception of the administration of the law. Mr. Robinson is compiling a list of correspondents in various states, from whom his Section can obtain information regarding local criminal practice.

The next topic for consideration was "State and Local Bar Association Activities." Mr. Henry W. Petzinger, of Canton, Ohio (Secretary, Stark County Bar Association), described the law library maintained by his Association. It now has about 17,000 volumes and is maintained by dues from members and by part of the notary fees taxed by the clerk where acknowledgments are taken by attorneys, which produces a fund of over $3,000 a year.

Legal Institutes

The next subject was "Legal Institutes," which Chairman Maguire explained would be treated as the emphasized feature of the meeting. In the absence of Mr. W. E. Stanley, of Kansas, who was prevented from attending by illness, the discussion was led by Mr. Chas. W. Racine, of Toledo (State Delegate from Ohio). He explained the city institutes, which originated in Ohio, and dwelt on the type of work which can be done by providing speakers of distinction. Mr. Barkdull referred to the rural institutes which have been held under the supervision of the Ohio State Bar Association, these institutes being held at some central point for a number of contiguous counties. Mr. John T. Gray, Jr., Brownsville, Tenn. (Vice-President, Tennessee Bar Association), stated that Tennessee is planing an experiment with legal institutes, as a result of the attendance at the Columbus Regional Conference last year by Judge Davis, of Athens, who was then President of the Tennessee Association. Mr. Gould told of a series of eleven lectures planned by the Toledo Bar Association on practice subjects. If there is a sufficient demand for these lectures to justify the expense, they will be transcribed and published. Mr. Maguire referred to the very successful series of rural legal institutes put on in Florida as the result of the attendance of President Redfearn at the Atlanta Regional Conference last year. The program for these Institutes has been largely devoted to intensely practical current subjects in the Florida law. Mr. Abernethy stated that the Ohio Association has a standing Com-

mittee on Institutes; and Mr. Henney explained the plan of the Ohio Association as to Institutes in rural communities as follows: select a hotel in a central location which will provide adequate facilities for meeting and have an Institute covering a territory that will enable lawyers to leave and return home at a reasonable hour the same day; the State Association office sends out dodgers to each member of the bar in the territory covered and also bulletins newspapers in the counties covered, which advertising should be followed up by postcard notices sent out by local associations; the meeting starts with lunch, followed by afternoon round table session; if evening session, use two or three speakers. Mr. Fredriks told of a practice course being conducted in Cincinnati.

Unauthorized Practice

The next subject discussed was "Unauthorized Practice." Mr. Grover C. Hosford, Cleveland (former President Cuyahoga County Bar Association), stated that the bar and the trust companies in Cleveland solved their difficulties by a consent decree whereby the trust companies quit drawing wills and trust agreements and soliciting patronage from wealthy persons. There has been a decision by the Court of Appeals of Franklin County, Ohio, enjoining real estate brokers from preparing contracts of sale, but this case was not taken to the Supreme Court. There has recently been a similar Cleveland common pleas court judgment, in which the recent decision of the Minnesota Supreme Court to the contrary was rejected. Mr. Henney stated that this litigation was a matter of rather bitter controversy and was apparently not popular with the public. Mr. Ballantine explained the situation in Louisville, stating that title insurance companies had agreed with the Bar Association that they would refrain from giving title opinions. Mr. Richard D. Logan, Toledo (President, Toledo Bar Association), suggested that bar associations should appeal to the lawyers on the basis of what they can give to the profession through organized activities, rather than on the basis of what they can get out of their Association. He mentioned the striking comparison with the medical profession in Cleveland, where the doctors pay $35 a year membership fee while it is difficult to get many lawyers to pay $10 a year for membership in the Bar Association.

Junior Bar

Mr. Maguire at this point directed attention to the fact that the Junior Bar Conference, which had theretofore during the day been in separate session in an adjoining room, had adjourned and joined the meeting. He asked Mr. James Arthur Gleason, Cleveland, to say something about what the Junior Bar Conference had been considering. Mr. Gleason particularly emphasized the need for contact between the Junior Bar Conference and the older lawyers, suggesting consideration of a plan for the older lawyers to meet with groups of newly-admitted lawyers at lunch or dinner, so as to stimulate interest in organization work and provide opportunity for immediate acquaintance and contact with the better influences of the bar. Mr. Gleason stated that there is a publication, in the nature of a guidebook, which is available through State Junior Bar Chairmen for any one wishing to formulate programs.

Legal Service Bureaus

The next subject under discussion was "Legal Service Bureaus." Mr. Silas Harris, Columbus, Ohio, (Ohio State University Law School), told of a survey which had been made in Columbus in an effort to ascertain what small legal business was not coming to lawyers and found a considerable amount of such business even among downtown merchants. Action to meet the problem thus disclosed is under consideration.

ARRANGEMENTS FOR ANNUAL MEETING, PHILADELPHIA, PENNSYLVANIA, SEPTEMBER 9-13, 1940

Headquarters—Bellevue-Stratford Hotel

Hotel accommodations, all with bath, are available as follows:

	Single for 1 person	Double (Dbl. bed) 2 persons	Twin beds for 2 persons	Parlor suites (2 rooms for 1 or 2 pers.)
Adelphia (13th & Chestnut)	$3.50–5.00	$5.00–6.00	$6.00– 8.00	$12.00–25.00
Barclay (18th & Rittenhouse Sq. E.)		6.00	7.00–10.00	12.00–18.00
Bellevue-Stratford (Broad & Walnut)	All space exhausted.			
Benjamin Franklin (9th & Chestnut)	3.50–5.00	5.00–6.00	6.00– 8.00	12.00–14.00
Drake (1512 Spruce St.)	3.50	5.50	6.00	10.00
Essex (13th & Filbert)	3.00–3.50	5.00–6.00	7.00	
McAlpin (19th & Chestnut)	2.25–2.75	4.00	4.50– 5.00	
Majestic (Broad & Girard)	2.50–3.00	4.00–5.00	5.00	8.00–12.00
Philadelphian (39th & Chestnut)	3.00–4.00	5.00–5.50	6.00– 8.00	9.00–20.00
Ritz-Carlton (Broad & Walnut)				10.00–12.00
St. James (13th & Walnut)	3.00		5.00- 6.00	10.00
Stephen Girard (2027 Chestnut St.)	2.75–3.25	4.50–5.50	5.50	
Sylvania (13th & Locust)	3.00-3.50		5.00- 6.00	10.00-12.00
Walton (Broad & Locust)	2.50–4.00	4.00–5.00	5.00– 6.00	8.00–12.00
Warburton (20th & Sansom)	3.00		5.00	
Warwick (17th & Locust)	4.50–5.50		7.00– 8.00	12.00–14.50
Wellington (19th & Walnut)	4.00		6.00	8.00

EXPLANATION OF TYPE OF ROOMS

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, **first and second choice** of, number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

ABRAHAM LINCOLN AND THE STATEHOOD OF NEVADA*

Nevada Came into Union under Emergency Conditions—Her Votes Needed for Abolition Amendment: Two-Thirds Vote Required—Narrow Margin in House of Representatives—Charges of "Log-Rolling"—Lincoln Feared Defeat in Presidential Election of 1864—New Constitution Sent to Washington by Wire—Admission of State was a War Measure

By F. Lauriston Bullard
Editorial Writer, Boston Herald

IN VIEW of the criticisms often made of the admission of Nevada it may be noted that at the time Colorado had a population no larger. The Centennial State had to wait until 1876 for admission. The people rejected one Constitution and Andrew Johnson twice vetoed a statehood bill based on another. During the debate Charles Sumner declared that instead of an apportionment population there were not more than 25,000 in the Territory. As to Nebraska, the people voted against becoming a State in 1864, and in 1866 a majority of only 100 in a vote of 8000 approved a Constitution. This time Congress admitted a State over a Presidential veto. At that time Nebraska could not satisfy the apportionment qualification. For that matter, Idaho did not attain that representation basis until ten years after admission, and Wyoming entered the Union in 1890 with only a third of the apportionment ratio and never yet has satisfied that requirement.

Nevada and Lincoln's Second Term

These States did not come into the Union under emergency conditions. Nevada did. The vote of at least one additional state was believed to be necessary for the abolition of slavery, and Congress hurried forward its admission in order to make sure of three more electoral votes for Lincoln's second term.

Each House twice debated the Nevada bill. In the thirty-seventh Congress the Senate passed it and again in the thirty-eighth Congress, but the measure failed of passage the first time in the House. In the upper chamber in 1863 "Ben" Wade insisted that the criterion for the admission of a State ought to be the rapidity of the increase of its population and not the present population. "I am credibly informed by the Commissioner of the General Land Office," he said, "that Nevada's population cannot be less at this time than 45,000, and increasing with unexampled rapidity." A motion to prescribe a population of 65,000 having been rejected, the bill was passed 24 to 16. The "Yeas" included such familiar names as Harlan, the two Lanes, Morrill, Sumner, Wilmot, and Wilson of Massachusetts. On that same day the House refused to suspend the rules so that the Nevada and Colorado bills might be taken from the table.

The Senate in the first session of the new Congress had no trouble in passing the bill again. Wade reported it from the Committee on Territories on Feb. 16, and it came up for passage eight days thereafter. The measure required that the Nevada constitutional convention should provide "by an ordinance irrevocable without the consent of the United States and the people of the State: First, that there shall be neither slavery nor involuntary servitude in the State otherwise than in the punishment of crime. . . Second, that perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and Third, that the people . . . agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the Territory, and that the same shall be and remain at the sole and entire disposition of the United States." A Constitution having been adopted by a majority of legal voters was to be certified, with a copy thereof, to the President, and thereupon it would "be the duty of the President of the United States to issue his proclamation declaring the State to be admitted into the Union . . . without any further action whatever on the part of Congress." There was very little debate. The *Congressional Globe* simply states that the bill was passed. In the House on March 17 this bill was read *in extenso*. Ashley intimated that the measure needed no explanation further than to say that "it passed the Senate two years ago and again unanimously at this session." And again the *Globe* records simply that the bill "passed."

No Record Vote on Statehood Bill in Senate

That word "unanimously" is important. A recent Lincoln biographer has said that neither House was willing to have a record Yea and Nay vote taken, that "whether through clerical inattention or by official arrangement" these votes were not recorded. That the bill was "engrossed, read a third time, and passed" is all we know. But it does not necessarily follow that the members of the two Houses wished to dodge publicity. Nobody in either House asked for the Yeas and Nays. In both Houses there were those opposed to, or not entirely satisfied with, the policy represented by the bill. Yet, on Ashley's authority, the Senate had "unanimously" endorsed the bill, and Ashley certainly was confident of its acceptance by the House. Nobody challenged him. He had the votes. It would be interesting to know how that vote stood, of course, if only because a minority of 48 had been unwilling to allow the bill to come before the House twelve months before.

*Continued from the March number of the JOURNAL, page 210.

Decidedly one would like to have exact information about that vote, because the President himself is represented to have instigated log-rolling methods and to have authorized pledges of patronage to make sure the bill should not fail. The testimony of Charles A. Dana on this point is generally accepted. His story first came to the attention of the general public in 1898 while his "Recollections" were running in *McClure's Magazine*. In the same year they appeared in book form. We now know that these "Recollections" were prepared by a ghost writer, none other than Ida M. Tarbell. The distinguished editor of *The Sun* did not want to take the time and trouble to do the job himself. Miss Tarbell got her material in a long series of conferences. Dana was to see the proofs. His death occurred in October, 1897, so that he lived to scan only a single chapter. He had told this story, however, in precisely the same words, in a lecture at New Haven in 1896. This address was copyrighted in his name. His son allowed it to be published in a limited edition in 1899.

Charles A. Dana's Account of Vote in House

Dana describes what he recalls as having taken place "in March, 1864" when the question of Nevada's statehood "finally came up in the House of Representatives." Dana then was Assistant Secretary of War with an office on the third story of the War Department building which the President visited at times. On this occasion the President expressed his anxiety "about this vote" which was "going to be close" and must be taken "next week." Dana cited as Democrats who could be counted on James E. English, of Connecticut, and "Sunset" Cox, of Ohio. Not enough. More Democratic votes must be had. The President named three Democrats with whom he wanted Dana to "deal." Dana did not name them. But with the distinct authorization of the President he was to promise two men from New York and one from New Jersey whatever they might want, no matter what it might be. Dana quotes the President as saying: "Here is the alternative: that we carry this vote, or be compelled to raise another million and I don't know how many more men, and fight nobody knows how long. It is a question of three votes, or new armies." Dana "saw" the three men. They were "afraid of their party." Two of them wanted "internal revenue collectors' appointments," whether for themselves or for constituents is not clear. The third wanted for a friend "a very important appointment about the custom house of New York." Dana gave them his word. They voted "right." Among other details in this comprehensive account Dana records that the custom house appointment was delayed until Andrew Johnson assumed the Presidency and that he refused to fulfill "the sacred promise" his predecessor had made.

This episode was reported by Mr. Dana first to an historical organization as an example of Lincoln's "supreme political skill." What records Mr. Dana had we do not know. It has been assumed always that a man in his position, with his years of experience as a writer and editor, must be accepted as a competent authority even though he relied on memory alone. Yet the more carefully one examines the situation, and the more he studies accessible records, the more difficult he finds it to accept in every respect the Dana account. Incidentally, that was anything but an example of "supreme political skill." It was commonplace, the ordinary practice of politicians in office. Lincoln is described as doing what governors and presidents always have done; he used the appointive power to accomplish his purposes. What necessity could there have been for buying Democratic votes? The full membership of the House then was 183, of whom the dominant party, sometimes called Republicans and often

Chief Justice Taney administering oath of office to Lincoln as President. (From Chief Justice Taney home, Frederick, Md.)

Unionists, could count upon more than 100. Schuyler Colfax was elected Speaker by a vote of 101 to 81, which is described by James G. Blaine as representing "the distinctive Republican strength in the House." He adds that "on issues directly relating to the war the Administration was stronger than these figures indicate, being always able to command the support" of several others to whom he alludes. The admission of Nevada was a party policy, yet the Dana account depicts the clear Republican majority in the House as seriously at odds over what everybody knew was an important party and Administration measure.

Lincoln's "Million Men"

What about that additional "million" men? Did the President for once indulge in hyperbole? At no time did the grand total of Union troops number a million. The total enlistments, which must have included many re-enlistments, for the four years of the war fell somewhat short of three millions. On New Year's Day of 1864 there were in the service 860,737 men. One year later the number reached 959,460. These totals include both regulars and volunteers, and are divided almost equally between soldiers present and absentees. The President presumably was indicating his view that the addition of Nevada would be of great value for its moral effect and for its implications as to the destruction of slavery.

And what about other witnesses? Nobody else has tales to tell about the purchase of Democratic votes for the Nevada bill, but there are several who relate stories similar to Dana's in connection with the adoption of the resolution for the abolition amendment to the Constitution. For the passage of that resolution a majority would not be enough. It must have two-thirds in both Senate and House.

Three Votes Needed for Abolition Amendment

Congressman A. G. Riddle, of Ohio, published his "Recollections of War Times" in 1895. He relates that the votes of two or three Democrats in the House were "absolutely necessary" to get the measure through, and that Mr. Ashley reported "in confidence" their acquisition. A certain member would "largely augment his chances" for a job he coveted by voting for "the abolishing amendment." Another Democrat would ensure in like manner his success for a contested seat in the next House. It was necessary also "to secure the absence of one Democrat from the House on the day of the vote." Riddle intimates that his absence was to be rewarded by the postponement until the next Congress of a bill which "a railroad in Pennsylvania" objected to, he being an attorney for the road. Riddle says that he "cannot vouch for the means employed to secure the Democrats," but that the two in question voted for the amendment, and that "the railroad lawyer was taken so ill that day that he could not be carried into the House."

To be considered also is the modicum of evidence offered by Congressman George W. Julian, of Indiana, whose "Political Recollections" appeared in 1884. He alludes to the solemnity of the spectacle "pending the roll-call" on the amendment, and says: "The success of the measure had been considered very doubtful," and depended upon certain negotiations the result of which was not fully assured and the particulars of which never reached the public.

Definite and emphatic in his testimony is a third member of the House, John B. Alley, of Massachusetts. He contributed an article to the volume of "Reminiscences of Abraham Lincoln" which was edited by Allen Thorndike Rice, and published in 1888. According to this Congressman the President sent for two members of the House and said that the two votes lacking to make the two-thirds required "must be procured." When asked how that could be done, Lincoln is reported to have said: "I am President of the United States, clothed with great power. The abolition of slavery by constitutional provision settles the fate for all coming time not only of the millions now in bondage, but of unborn millions to come—a measure of such importance that those two votes must be procured. I leave it to you to determine how it shall be done; but remember that I am President of the United States, clothed with immense power, and I expect you to procure those votes." This witness concludes his statement thus: "These gentlemen understood the significance of the remark. The votes were procured, the constitutional amendment was passed and slavery was abolished forever."

CHARLES A. DANA, 1819-1897
Assistant Secretary of War, 1863-1865. Editor of The Sun (N. Y.) for 30 years. (Picture from James Harrison Wilson, *Charles A. Dana*. Harper's. 1907.)

"Log-Rolling" Used?

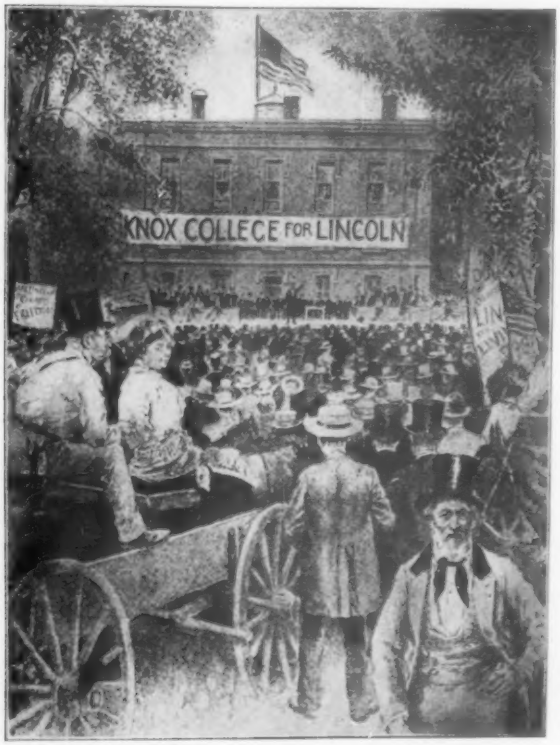
The historian Rhodes nowhere discusses this matter at length. He was aided in the preparation of his account of the adoption of the amendment by a son of Representative Ashley. Conceding that many of the Democrats "acted according to real convictions," and expressing the opinion that no money was used, he says that "others" of the Democrats "were won over by a process of log-rolling." In estimating the value of the Dana account it should be noted that he was

in Washington in all probability when both the Nevada vote and the amendment vote were taken. The Official Records of the War show that Dana was in his office on March 2 and 15 in 1864 and on ten non-consecutive days in January, 1865.

On the face of the record the necessity for using the powers of the President to buy votes for the admission of Nevada does not appear. It certainly does appear to have been necessary to use the powers of the Executive to ensure the adoption of the resolution for the Thirteenth Amendment. The actual sentiment of the House on the statehood question was not disclosed by the adverse vote of March 3, 1863. On that last day of the thirty-seventh Congress the Administration lacked ten votes of the two-thirds required to suspend the rules. Elihu Washburne wanted to have taken from the Speaker's table the bills for the organization of both Nevada and Colorado. Vallandigham objected and demanded the Yeas and Nays. As of December 1, 1862, the membership of that Congress was: Republicans 100, Democrats 44, Unionists 30, with three vacancies. The vote on Washburne's motion was 65 to 48. Among the many not voting were several Republicans. In the melee of a final session many curious things happen. One risks little if he assumes that on the straight issue of Nevada's statehood the Administration would have won.

Difficulty in Securing Necessary Two-Thirds Vote

At all times there were grave doubts if the abolition resolution could be put through the House. On June 15, 1864, it was defeated 93 to 65, with 23 not voting—13 short of the requisite two-thirds. After the election of the following November the Administration had no doubt of what the result would be if action should be put over until the thirty-ninth Congress should convene. In his annual message the President dealt with the issue. For the first time the voice of the people had been heard thereon. The new House which would take office in March, 1865, would surely pass the amendment. Why then "should not the present House, which had failed to adopt it at the previous session, now act upon it favorably? . . . Why not agree that the sooner the better?" The vote was taken on the last day of January, 1865. The amendment carried 119 to 56, with eight not voting, a bare margin of three votes. Little wonder that the floor and the galleries were swept with a storm of cheers. Recorded as voting Yea were 11 Democrats from the non-slave States. Of the two mentioned by Dana, and said by him to have been reckoned as "sure" by Lincoln, English voted Yea and Cox Nay. Of the abstainers six had voted Nay, and only two had abstained, in the vote of the preceding June.



Lincoln and Douglas at Galesburg

Nevada's Votes Desired for November, 1864, Election

While it may not have been necessary to employ log-rolling methods to bring Nevada into the Union, the President and many party leaders were determined that the new State should be admitted before the November election and they depended on its lone Representative, Henry G. Worthington, for one of the votes needed for the passage of the abolition resolution. The eastern newspapers make the reasons for haste abundantly clear. The *New York World* on the day Nevada was proclaimed a State declared that the President was counting on the three additional electoral votes to which the new member of the family would be entitled. The *New York Herald* expressed similar opinions. The *Boston Transcript* said: "There can be no doubt how the three electoral votes of the new State will be cast." During that black summer of 1864 Abraham Lincoln for once lost confidence in his own destiny. Assuming that he could not be returned for a second term, he had every member of his Cabinet sign a paper, which, as they learned weeks later, contained his pledge to cooperate with his successful opponent for the saving of the Union. Even as late as mid-October his defeatist mood came back at intervals. One evening in the War Department telegraph office he wrote out in his own hand and from memory an estimate of the prospective electoral vote. He allowed McClellan 114 electors and the Administration 117. He did not count Nevada although the arrangements for its admission had been completed. Major Eckert added the new State's three votes to the President's total.

For Nevada to be admitted in time it was necessary to modify the Enabling Act and to use extraordinary means to get the Constitution of the new State to Washington. Congress thoughtfully provided for both contingencies. The date for the popular vote on the proposed Constitution had been set too late in the Act. Governor Nye forwarded a memorial to the national capital suggesting that this vote be set forward four weeks, so that the voters might pass on the Constitution on the day that Nevada would elect county and territorial officers. Between this date and the Presidential election there would be an interval of two months. The poll must be canvassed by the Governor, the United States District Attorney, and the Territorial Chief Justice, and certified to the President in Washington together with a copy of the Constitution. Also the new State must organize the districts for the national election.

Constitution Telegraphed to Washington

To complete the process of admission, resort was had to the wire. The trip from Carson City to Washington was no easy journey in those days. On Dec. 15 the first State Legislature elected William M. Stewart and James W. Nye as Nevada's Senators. They traveled by way of Panama and took the oath of office in the Senate Chamber on Feb. 1, the day after the adoption in the House of the abolition amendment. Worthington, elected earlier, came across the prairies to railhead, and was sworn into office on Dec. 21. Both Secretary of the Navy Welles and Attorney General Bates record in their Diaries that on Sept. 30 Seward, the Secretary of State, produced at a Cabinet meeting a telegram from Governor Nye announcing the adoption of the Constitution, and urged that the President accept this notice as sufficient warrant for the issuance of the proclamation of admission. Other members of the Cabinet deprecated this idea and Lincoln adhered to the letter of the law. The terms of the Act could be fulfilled only by using the Overland Telegraph line, which had been completed a couple of years before.

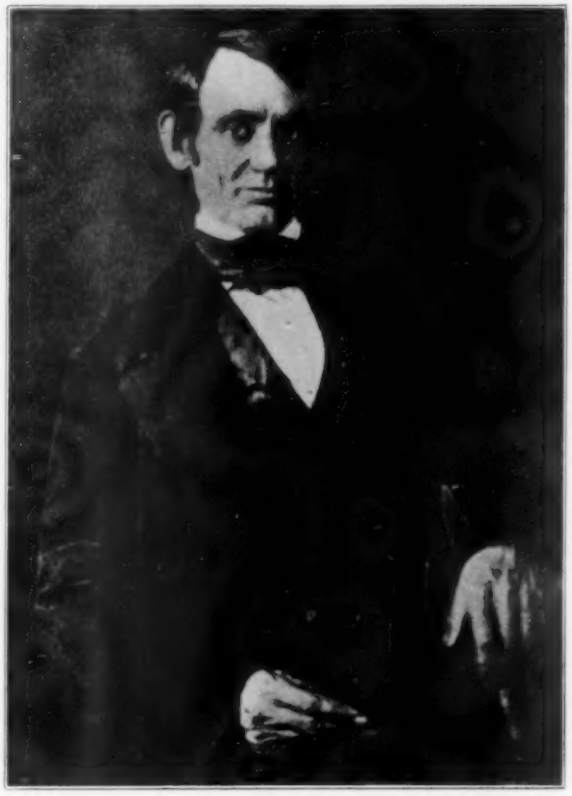
That despatch is on file in the National Archives. It covers 175 pages and embodies about 15,000 words. Another copy was forwarded by Overland Mail and express riders, and a third by the roundabout ocean trip from San Francisco. On March 3, 1865, the Legislature appropriated for payment of the telegraph bill $3416.77. Two Morse operators tapped-out that immense message by the dot-and-dash system. One was Frank Bell, the district manager at the time of the California State Telegraph Company. He was appointed Lieutenant Governor in 1889 and succeeded to the Governorship on the death of the incumbent. All day long on Oct. 26 he bent over his key. The message was relayed at Chicago and Philadelphia and was received in Washington on Oct. 28. The President issued his proclamation on the last day of that month. Nevada duly cast her electoral vote for Lincoln and Johnson on the Union ticket.

Nevada Ratifies 13th Amendment

For the adoption of the Thirteenth Amendment, the ratification of Nevada also was considered imperative. With 36 States, 27 ratifications would be necessary, and there was apprehension that the amendment might fail unless Nevada could be counted upon. The day after the House passed the resolution Illinois ratified the amendment, two more States ratified next day, and three others the third day. Nevada was swift but distance was against her. Carson City acted on Feb. 16, providing the fifteenth ratification. By Dec. 9 the required number of States had acted, among them eight former members of the Confederacy. Before the turn of the year three more States had ratified, including one more Confederate State.

The "Battle Born" State

For three reasons the admission of Nevada was promoted by President Lincoln, and all three were war measures: to ensure the adoption of the abolition resolution in Congress, to obtain a precious cluster of votes for the President in the Electoral College, and to supply one more ratification for the abolition amendment. With excellent reason did Bancroft long ago, and the Federal Judge of the District of Nevada, Frank H. Norcross, recently, with scores of others between, pronounce Nevada "the Battle-Born State."



Lincoln's first portrait, aged 37. Taken when he began riding the circuit. Reprinted from March, 1937, issue of the *Journal*.

Junior Bar Notes

(*Continued from page* 309)

New York Monthly Luncheon Successful

Professor Philip C. Jessup, Professor of International Law at Columbia University, addressed the second of the series of monthly luncheons of the Junior Bar Conference held in the downtown New York area on February 19th. Professor Jessup's discourse on "Current Assertions of Neutral Rights" dwelt upon the incidents of the "Altmark," the "City of Flint" and the detention of neutral vessels at control ports by the British. Similar luncheon meetings are planned for the Spring months. Frank L. Dewey, who is in charge of membership work in the Second Circuit, assisted by Lymon M. Tondel, Jr., has arranged this series of luncheons which thus far have had attendances of more than 100.

Ohio Welcoming Luncheons

Welcoming luncheons to successful applicants for admission to the Ohio bar were held in February at Columbus, Cincinnati and Cleveland. These were sponsored by the Junior Bar Section of the Ohio State Association of which Earl F. Morris, former Council member of the Conference, is Chairman. To these projects valuable cooperation was given by the Cleveland Bar Association, the Barristers Club of Columbus and the Junior Bar Committee of the Cincinnati Bar Association. Conference Council member James A. Gleason, State Chairman Clark Morrow and Membership Committeeman, Harry E. Green, represented the Junior Bar Conference at these ceremonies.

THE ACHIEVEMENTS OF THE AMERICAN BAR ASSOCIATION: A SIXTY YEAR RECORD*

Stages in Bar Organization—Each Form Answered Its Purpose for the Time, But Needs of Profession Called for New Plan—Association Wins Right to Speak for Whole Bar—Development of National Program—Place of Assembly and House of Delegates—The Future

By Max Radin

CHAPTER XI
THE RECORD

WITHIN sixty years the American Bar Association has grown from a professional group, organized primarily for their own protection and advancement, to a great communal institution. It is extremely unlikely that during the first years of its existence public note was taken of it to a greater extent than of the meeting of societies of entomologists or astronomers. Today a meeting of the American Bar Association is front page and headline news, not only in the city in which the meeting is held, but throughout the country.

The record of its accomplishment as presented in the foregoing pages gives only certain high points, a number of definite activities of larger than ordinary import in which the Bar Association has improved the situation in the country as far as the administration and the formulation of law are concerned and as far as the relation of the profession of law to the public is concerned. It is a notable record and one that may be viewed by lawyers with legitimate gratification.

That the Bar Association has not cured all the ills of the law or of society is not altogether surprising. It may even be properly said that it has not done all that it might conceivably have done. But among the specific results of its activity there is one general one that is apt to be forgotten.

Association a Forum of Discussion

The American Bar Association in its meetings and in the meetings of its affiliated and associated legal organizations has become something of a forum in which those ideas in law and in social and economic reform or change that have been agitating the community might be discussed.

Ideas have been expressed and points of view advocated in the meetings of the Association which are widely at variance with those maintained by the majority of the members. It is still true—it will probably be long true—that most of the members of the Bar Association are conservatives in every sense of the word, but it has really never been true that they have refused a hearing to those who vigorously and even violently advocated change, even in the fundamentals of our system.

That these projects of fundamental change have found few supporters among the lawyers of the Association is eminently true. It would be unnatural if it had not been so. And that there were a certain number of persons in the Association who resented even the least suggestion of radical reforms is also true. The Association, however, may justly claim the credit of having given a hearing to views and doctrines that profoundly shocked a great many of its members.

This, it may be fairly urged, is an accomplishment of no mean value. The administration of the affairs of government in all its branches and in all its aspects will always involve the assistance of lawyers. The existence of a great and semi-public body in which every conceivable doctrine may be formally presented and discussed will prevent lawyers from living in a segregated and unreal world, a situation that could well be the result of a purely technical and professional body meeting behind closed doors and canvassing only the technical problems of its own practice.

The relations of the bar to the general community are still quite unsatisfactory. There is still far too strong an attitude of fear and suspicion on the part of the public, and far too frequent a repetition of the hackneyed jibes at the assumed rapacity and technical woodenness of legal practice. This is in part a screen for a profound psychological resentment against the mere existence of professed groups of experts in justice, but it is also a reflection of the feeling that lawyers almost of necessity serve the needs of the economically more privileged classes and not those of the less privileged.

A very similar situation—not usually so bitterly and personally expressed—exists in the profession of medicine and has given rise to a demand for a new method of medical organization, sometimes called "socialized medicine." The same terms applied to the law would not mean quite the same thing, and, so far as its main purpose is concerned, agencies exist at the present time which attempt to make litigation in small claims or by destitute persons less expensive and in some cases wholly gratuitous.

Social Responsibility of Profession

This aspect of the law has been considered by the Association but it has been left in a large measure to local agencies to deal with. A much larger aspect of the social responsibility of the profession has been that which is the subject of a previous chapter, the conscious participation of the Bar Association in the discussion and solution of the pressing problems of the day.

A special association of lawyers who support progressive doctrines in the solution of these problems has been recently formed and has taken the name of the National Lawyers' Guild. It is a healthy movement that groups of lawyers are formed for the more detailed and energetic examination of these questions, even if the examination is in a sense predetermined by avowed sympathies.

But there is no reason why the segregation of such groups should involve a schism. Groups of any coloring that make possible a more complete study of views that

*The first chapters of Professor Radin's study of the Association's history were published in the November, December, January, February and March numbers of the Journal.

interest—or should interest—lawyers, may well serve the function of laboratories in which the presentation of these views is more effectively prepared for the body that means to comprehend all the lawyers of the country. Since every factor in society has a legal aspect, there is nothing to prevent every social or economic idea from having a legal advocate. And the American Bar Association is the most suitable forum for the exercise of this advocacy.

To raise the standard of the legal profession, to improse the administration of the law, to destroy the barriers between the lawyers and the public, these are lofty objectives toward the attainment of which a real progress has been indicated in the sixty years of the history of the American Bar Association. The future undoubtedly imposes a duty of further and unceasing progress in the same directions.

It was, therefore, quite natural, as the American Bar Association became more and more identified in the public mind with the profession as a whole, that an active movement would arise to make the Association in fact, if not identical with the profession as a whole, at any rate approaching such identity.

For this there was ample precedent in the history of the profession. The English lawyers, in the proper sense—i.e., the barristers—gained their right to practise by membership in one of the "Societies" of the Inns of Court. They could not practise except as such members. A similar situation existed in many French cities which had formerly been capitals of feudal states. If this fact implies "integration," it can be said that "integration" of the bar is no new thing. Indeed it seemed for centuries the only conceivable form of professional organization.

Medieval Guild Not a Real Precedent

But this type of organization was based on the notion of the medieval guild. It was essentially aristocratic. Membership was sharply restricted and conferred high privileges. When the American Bar Association was organized, the background of legal practice was altogether different. In some states legal practice was as free as undertaking any commercial business. In most states, requirements for entering the profession were few and lightly administered. The result was, of course, a proportionately larger number of lawyers than had ever existed in England or France. Again, so far as the country as a whole was concerned, the geographical extent was such that it was almost impossible to suppose that even on a single occasion could all the lawyers of the country meet in a single place. No such impossibility existed in England or France.

The medieval guild of a small number of privileged lawyers who were also the exclusive possessors of the right to practise, offered no real precedent for the organization of the American Bar. But the existence of a large number of persons equally privileged, scattered over a territory too great to permit all of them to meet, indicated the application of the representative principle. When many persons cannot meet and still desire to act in concert, they must select others to act for them. This was stated as long ago as the publication of the *Institutes* of Justinian. If the lawyers of the country wished to have accredited representatives, it was hard to see how it could be done unless they elected these representatives just as the citizens of the country elected their legislators.

"Representation" and "Federation"

But the first efforts were based on another notion. It was not so much the problem of "representation" as

Pirie MacDonald

WILLIAM L. RANSOM
President, American Bar Association, 1935-36

of "federation" that seemed an urgent one. Mr. Baldwin, to whom more than to any other one man the original incentive that led to the founding of the Association is due, had in mind a "federated" association. The basis for considering a federated bar as a desirable thing was, of course, the federal character of our national constitution. But the movement was not merely the reflection of an historical accident. There was a substantial reason for regarding the federal character of the country as a controlling analogy.

It was a fact that striking local differences made the bars of certain states different in type and character from those of others. It was a fact once more that local associations had been formed in many states that were older than the national body and had an honorable history as well as an established function in their communities. Further, the varying degree of control which the legislatures of different states exercised over the practice of law in their jurisdictions, made it difficult to apply rules generally over the United States and suggested the type of organization in which the individual character of groups is maintained while a general unification is none the less made possible.

The process of federation, one might say, presented itself first as a purely state problem. In many of the states there had been local associations, county and city bar associations, special and particular bar associations, and in many of them there were also State Bar Associations which had little or no connection—certainly no formal connection—with the local bodies. Evidently the problems of coordination and unification could be much more readily solved within the state structure than within that of the nation.

The process of welding the state organizations of

PHILIP J. WICKSER

lawyers into a single one had been going on for some time. And in 1916 a new impetus was given to it. Two types of organization are now common. First, there is that of Pennsylvania, in which the State Bar Association consists partly of individual members and partly of county associations. The executive committee is exclusively composed of delegates from the eight zones of county associations into which the state has been divided. Second, there is the plan prevailing in Illinois in which seven federations of bar associations, consisting exclusively of delegates, work in cooperation with a state organization of individual members, and elect seven of the twenty governors of the State Association. There is also the type of organization represented by that of New York in 1930 in which regional federations of delegates are wholly independent of the State Association of individuals.

All these associations, whether federated or unfederated, are optional for the lawyers. In none of them were more than half of the lawyers of the state members of any of the associations. No one of them could be said to speak for the entire bar.

"Integration" of the Bar

But in 1914 we see the beginnings of another idea in state organization that went far beyond the notion of federation. This was the movement toward "integration." Apparently the matter was still in the discussion stage in 1919.

Integration harks back to the ancient guild notion but places it on a democratic basis. Membership in the integrated bar is compulsory. Only as a member of the integrated bar may a lawyer practise at all. The integrated bar is generally in the form of a public corporation with wide powers and a special relationship to the Supreme Court of the state.

The movement for integration made rapid headway and encountered violent opposition. In New York, through an unfortunate attempt to secure excessive political authority for this type of organization, the effort failed completely and in 1927 not only the State Bar Association but all the local ones repudiated it. It may be doubted, however, whether all those who voted negatively constituted anything like a majority of the lawyers of the state.

In February, 1939, twenty-one jurisdictions, including Puerto Rico, had an integrated bar. In one of these, Oklahoma, the State Bar bill was repealed but the Supreme Court exercised its power over the legal profession and integrated the bar by court order. By compensation, in fourteen other states the movement for integration had made great strides, and in many of these it will doubtless be successful before the end of the year.

The American Bar Association was the chief forum in which the battle for an integrated bar took place. In its meetings, members of such bars met lawyers who came from states which had rejected it, and unrivalled opportunities were presented to verify or disprove the predictions which were so freely made in connection with the process of integration. It may be said on the whole that the Association gave aid and comfort to the movement. The chief result of an integrated bar, an intensified control of the preparation, training, and professional conduct of lawyers, is wholly within the general objectives of the national body.

Clearly there is no means by which "integration" can be achieved for the national body. A bar association, whether voluntary or compulsory, can exercise its functions only as an instrument of the State Supreme Court. Indeed in some states, as in Oklahoma, integration was accomplished by order of the court by virtue of its control of those who are to practise before it. Evidently no body that transcended state limits could have this relation to a state court. So far as the national body was concerned, the ideal of a unified and accredited body could be effectuated only either by inducing most of the lawyers of America to become members, or by carrying out the idea of federation which had been so long examined and so successfully accomplished in a number of the eastern states.

Wickser Report on Bar Coordination

To study this problem a special committee on "coordination of the bar" was appointed in 1930, of which Philip Wickser of Buffalo was the secretary. To Mr. Wickser's devoted work in this field must be given a large measure of credit for its ultimate success. His article on Bar Associations in 15 Cornell Law Quarterly 390-419, written in 1930, is the point of departure for all discussions of the subject and, indeed, for the whole recent history of the organization of the legal profession.

The extent to which the American Bar Association had slowly advanced to the right to speak for the entire bar of the country may be evidenced in statistics. In 1880, two years after its foundation, it had 552 members. At that time there were said to be 64,137 lawyers in the United States. In 1938 it had 31,735 members. The total number of lawyers cannot be accurately determinated. It seems, however, that it will not be short of 180,000, if not well above this figure. The proportion consequently has risen from 8/10 of 1% to 17%, a ratio twenty times as great. But it is apparent that, considerable as this increase has been, the Association can still claim no more than about one-sixth of the bar for its membership.

If to the members of the American Bar Association there were added those members of local bodies that did not form part of the national body, the total mem-

bership would be, of course, appreciably increased. A tentative effort at coordination was made when in 1915 representatives of state associations were recognized as part of the national body and when in 1916 the Conference of Bar Association Delegates was made a section of the Association, like the Section on Comparative Law and others. It was this foundation on which the Committee on Coordination built.

This Committee received a grant of $50,000 from the Carnegie Foundation to provide for a three-years study of the problem, and the Association matched this amount. The sum was only partly expended when, in 1935, the Committee made its second report. The reports of the Committee for this and the following year and the discussion of them, 60 ABA Rep. (1935) 165-208, 556-573; 61 ABA Rep. (1936) 15-78, 803-813, constitute the material for the study of the entire question and amply illustrate both the nature of the problems involved and the difficulties of solving them. A full bibliography of all the previous discussion can be found in 59 ABA Rep. (1934) 603-605.

National Program for Lawyers

The Committee proceeded cautiously. In its first report it seemed more concerned with a "National Program" for lawyers than for any changes in organization. This program was based on the actual work undertaken by local associations in the recent past. It was by no means ambitious (59 ABA Rep. (1934) 591-595). The purpose of the program was the open and avowed one of gaining the confidence of the public by this demonstration of its interest in law reform, and equally of gaining the confidence of the profession by indicating concrete ways in which an organized and coordinated bar could serve both them and the community.

As all pointed out, this national program was not essentially different from the work the Association had done up to that day. The underlying idea, of course, was that if a much larger number of lawyers and legal organizations would participate more of this work would be done, it would be done more quickly and it would be done better. The problem was, as always, to find means by which state and local associations could be induced to take part. Evidently they could not be compelled to take part. And evidently, if they did, they must be permitted to take part on their own terms. It could not be asked of them that they reconstitute themselves as a condition of participation.

That is to say, the participating local institutions might vary from a small, carefully selected, long established group of eminent lawyers to an organization of which all lawyers are by the law of their state required to be members. For the purposes of coordination, the latter is much the more desirable basis, if the Association is ever to speak with the authority of the entire profession. But clearly the Association had no right to refuse the assistance of lawyers who refused this or any other particular form or organization.

When the Association met in 1935, four plans were proposed (60 ABA Rep. 563-573), to which a fifth plan was added from the floor (*ibid*, 202-203). These plans, briefly summarized by the Chairman, may be still further summarized:

1. Continuation and enlargement of the National Bar Program.
2. Improving the existing organization without notable change.
3. Increasing membership of the Association by multiplying occasions of service to lawyers.
4. Federalization of the bar and the creation of a House of Delegates as the governing and policy-determining body.
5. Decentralization of the power of the Executive Committee, election by ballot and a referendum on policies.

Federated Bar Becomes a Reality

After a long and vigorous discussion it was voted to adopt the principle of the fourth plan and to refer it for further study. In the meeting of the following year, the Plan was adopted so far as the new type of organization was concerned. The members present constituted themselves as the Assembly of the American Bar Association and plans were made for the selection and the calling together of the House of Delegates. The American Bar Association after fifty-seven years had become the federated bar contemplated by its founder.

When the Association met in 1936, it held the organization meeting of the House of Delegates. On September 27, 1937, the first annual meeting of the House of Delegates was held. The new constitution and by-

(*Continued on page* 358)

Boston Meeting, 1936: Assembly Adopts New Constitution for American Bar Association

AMERICAN BAR ASSOCIATION JOVRNAL

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THE ASSOCIATION'S ACHIEVEMENTS

Many thoughts are suggested by the completion, in this number of the JOURNAL, of Professor Radin's fine essay on the achievements of the American Bar Association.

The adoption by the Association of a radically new constitution in 1936, may not, perhaps, on the near perspective of today, reasonably be said to be as objective an achievement as those described in earlier installments. But it may yet outweigh them. What the Association did was to change *itself*. That was a disciplinary and hence a moral act calculated to characterize continuing activity. The new constitution was not an end in itself. If the dedication, the ideals and vision, and the energy which brought about the adoption of that constitution continue, the result must necessarily be vastly to increase the ability of the whole profession *through the Association* to achieve whatever definite objectives it believes should be achieved. As matters now stand the outcome rests as much with the bar and with the other Associations, as it does with the American Bar Association.

Once the philosophy and mechanics of the new constitution are understood this is not difficult to demonstrate. What the Association did was to make ready to share with all the larger organizations of the bar the right to speak in national terms for the profession. For nearly sixty years, as a selective voluntary organization, it had claimed that right in default of competitors, and even though it never reached as many as a fifth of the members of the Bar directly, through its own forum, or through affiliations. The history of the coordination movement from 1878 to 1930 (19 A.B.A.J. 17) shows that the main stumbling blocks to the attainment of a representative character were two: An unwillingness to allow non-members who paid no dues to have a voice in speaking for the Association; and a like unwillingness to allow members or non-members to express themselves unless they attended meetings. These were considerations which protected against an early overdevelopment of machinery which would have destroyed the Association. But they prevented the Association from attaining a truly representative character. The ideas they reflected had attained the force of traditional values, and had engendered vested advantages and perquisites, as traditional values invariably do. During the thirties, the bar itself became more self-conscious and more aware that its social responsibilities could only be discharged by collective action. This was a reflection of a social trend, and had all the force which social trends exert; it was not, primarily, of professional origin. The significance of the Association's reorganization lies in the fact that it recognized that the whole bar must be induced to accept a heightened collective obligation toward society and that such obligation could only be discharged by means of adequate organizational machinery. For the American Bar Association this involved some surrender of its individuality; the release of some traditional claims and perquisites; an increased financial burden, and the willingness to allow its control to pass to a House of Delegates, as a vehicle for the whole profession, from its own private Assembly, which had been a vehicle for its own members alone. The House of Delegates numbers 181 members. More than half of them are appointed by sister associations and affiliated organizations. More than 100,000 lawyers now have practical means for expressing their views on what should be the attitude and the activities of the bar nationally. Before 1936 no such opportunity existed. The old American Bar Association provided it for only 30,000.

If vision, sincere effort and self-denial constitute achievement, the reorganization of 1936 was a great achievement, and it may, as Dean Pound predicted that it would, ultimately rank with the foundation of the Association itself. If the American Bar Association cannot awaken the profession to the social necessity for a truly nationally organized bar, or if, awakened or unawakened, the profession refuses to function by means of the machinery it has provided, no lasting achievement will merit record. But the signs are otherwise. There has been steady growth since 1936. The House of Delegates has developed into a hard-working and conscientious body, of increasing influence. The public accords to its debates

and pronouncements an attention never accorded the old Assembly.

The reorganization of 1936 brought the Association into closer harmony with the democratic and representative foundations of our national polity, and enabled it, at long last, to begin to speak, as Simeon Baldwin hoped it would, with an accredited voice, for the entire profession.

USE OF RESTATEMENT BY COURTS

Increasing judicial use of the Restatement is interestingly reflected in the publication of the American Law Institute Publishers called the *Restatement in the Courts.* This volume gives, among other things, citation paragraphs for judicial citations of the Restatement which have appeared in the cases reported through the National Reporter system. In the first edition of this publication, which came out in 1934, there were 607 such paragraphs. Two years later the number had risen to 875. The following year there were 2646 such paragraphs, and this year's edition, which includes material received up to July 1, 1939, shows a total of 4753. Pennsylvania leads in the number of citations, with 660, not including "side reports." New York is second with 503. But many States in which the volume of judicial business is not so great show considerable additional judicial use of the Restatement. Wisconsin, for instance, shows 190, Mississippi 167, Minnesota 153, Connecticut 126. As might be expected, Contracts is the subject most cited. It was first to appear. The last volume of Torts came out only last November, but the total of Torts citations runs well over 1000.

It is much harder to say to what extent such citation is affecting results reached in litigation. Mr. Justice Cardozo described the various factors which influence a judge's decision in that remarkable book of his, "The Nature of the Judicial Process." But he did not and could not tell how a reader of a judicial opinion could determine which one of these factors was the conclusive one in any given piece of litigation and how that could be deduced from the four corners of a paper on which an opinion is written. The Restatement may be cited, along with judicial decisions, for a proposition of law. How much force has each in the court's mind? No one can answer. Sometimes the influence of a work like the Restatement is pretty clear. Thus in *Williams v. Kroger Grocery & Baking Company,* 10 Atl. (2d) 8, Mr. Justice Drew in an opinion of a little more than a page in length cites the Restatement of Torts six times. In *Pearlman v. Garrod Shoe Co., Inc.,* 11 N.E. (2d) 718, the New York Court of Appeals states the turning point of the case by saying: "Under the pleadings and proof, plaintiff may recover on the ground of negligence irrespective of contract" and cites the Restatement. Even in such an instance it is possible that the same result might have been reached if no Restatement of the Law had been written. Occasionally the influence of the Restatement seems to show itself even more directly. Thus in *The Lightning Delivery Co. v. Matteson,* 45 Ariz. 92 (1935), Mr. Justice McAllister says: "The most recent expression we have been able to find on the subject is by the American Law Institute in its Restatement of the Law of Agency, and it is to the same effect. In section 41 of that work the rule is stated and its meaning illustrated with two sets of facts so clear and so nearly the same as those with which we are here concerned that, coming as it does from an authority which the bench and bar of the country regard as the highest, it is decisive of the proposition."

An analysis of already published State Annotations totaling some eighty volumes shows that it is perhaps the most important place where the work of Restatement can influence the growing law. This analysis, which includes all State Annotations in the various subjects published up to February 1, 1940, shows some very interesting things. One is the comparatively slight variation between the local law and the general statement of the law expressed in the Restatement. In Conflict of Laws and in Contracts, for instances, cases on a composite recapitulation of all the Annotations show *contra* authorities only amounting to 2.6 per cent. In Agency it was down to 1.4 per cent. But the most interesting thing shown in the analysis is the frequency of great gaps in the case law of any State, even those which have a well developed jurisprudence through many volumes of reports. In Contracts the recapitulation of all annotations cited showed "no local authority" in 26.4 per cent of the total, but in Conflict of Laws it runs up to 47 per cent and in Torts it runs up to 46.4 per cent. Courts can thus, in an immense area in the law, accept the Restatement as authority, if they choose to do so, without the consideration of prior decisions either for or against the propositions set out in the Restatement. The rapidly mounting citations indicate an overwhelming likelihood that the Restatement will become more and more important to the jurisprudence of America.

THE CONSTITUTION—REVISED VERSION*

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UNLIKE Holy Writ, there is but one authoritative original text of the Constitution of the United States, but nonetheless we are witnessing today a "revised version" of it. The original text is still in existence because the nation for which it was created is young as history measures time. But the fading character of the mellowing parchment mirrors a powerful and fascinating story of birth, growth, and decay of certain of its principles and structure of government. For over one hundred and fifty years the changing kaleidoscope of national life has left its imprint and impact upon the Organic Law through its interpretation by the Supreme Court.[1] "Wars and rumors of wars," panics, booms, periods of normalcy, political upheavals, territorial expansion, scientific discoveries and industrialism —all these have played a role in the law of action and interaction of Constitution and the people for which it was brought into being. Schools of jurists, political thinkers, philosophers, economic theorists, reformers, business and industrial leaders, "practical" statesmen, labor leaders, academicians, religious leaders, and even Presidents of the United States, have during our national existence, because of their limited or a priori conceptions praised or blamed the Constitution, and have urged their interpretations and constructions of it. Justices in the Supreme Court have differed widely as to the proper meaning and scope of important phases of the Organic Act, and have written majority and minority opinions setting them forth. Some of these minority opinions have resulted in Amendments[2] and overruled judgments[3] also practices at variance with original or earlier conceptions. However, substantially many of the basic principles of government and its structure as created in the Constitution of 1789 are still in existence without express change or modification. This is because of the interpretative element supplied by the Supreme Court.[4]

Written Constitutions—Living Judges

Anatole France said: "The law is dead, the judge is living."[5] This is equally true of the Constitution, the supreme "law" of the land. The provisions of the Constitution, not being self-executing, must first be brought into life by statutory enactments; the skeleton must be enclosed with flesh and blood.[6] Thereafter, the judiciary in appropriate cases will construe, apply, and pass upon the validity of these enactments in the light of the Fundamental Law.[7] To do so, there must be interpretation of the constitutional document and text wherever applicable or where it cannot be avoided. Thus, in the words of Bishop Hoadley, "whoever hath the power of interpretation, he is the real ruler."[8] In the process, the judiciary tends to absolutism,[9] and, within certain limitations, the Constitution is largely what the judges say it is—until changed by the people or until a new personnel of judges comes upon the stage. It follows that the "real" Constitution is to be found in the judicial reports. Thus the Constitution is always in a "process of becoming," and is being judicially modernized or streamlined[10] to keep it abreast of the dominant viewpoints, the needs, and the emphases of each generation —unless an "independent" Court at times checks these tendencies. The late James M. Beck characterized the Supreme Court as a "quasi-constitutional convention"[11] always in session, when, through cases and controversies, the Court "amended" or "interpolated" by interpretation the provisions of the Organic Law. Since the greater part of the Constitution consists of non-definitive provisions, without particularization or precise meaning, it is at once seen how transcendent the influence of the judicial personnel can be, and has been, during our national existence.[12] It results from this fact that when certain social pressures become overpowering in the nation, due, for example, to economic depression not merely of temporary character, judicial interpretation of the Constitution will be different than in periods of normalcy.[13] The law of action and interaction between judges and people is again operative:

*This topic has been suggested by the phraseology employed in the King James version of the English Bible, where the revisionists state that "former interpretations have been diligently compared and revised." In the English revision of 1911 similar terminology is found. The several ancient manuscripts of the Scriptures, of varying antiquity, were the motivating factors occasioning revision.

1. Lord Bryce writing in "The American Commonwealth" (1888) said: "The American Constitution has been changed, is being changed, and will continue to be changed by interpretation and usage. It is not what it was even thirty years ago; who can tell what it will be thirty years hence?" Vol. 1, p. 406.

2. Such as the Eleventh and Sixteenth Amendments.

3. Cf. the impressive list of such overruled judgments to 1931, as detailed by Brandeis, J., in his dissent in *Burnet v. Coronado Oil & Gas Co.* (1931) 285 U. S. 393, at p. 405. The Burnet Case was itself later overruled by *Helvering v. Mt. Producers' Corp.* (1938) 58 S. C. R. 623.

4. Corwin, "The Constitution and What It Means Today" (1938) 6th ed.; ibid., "Court Over Constitution" (1937).

5. "La loi est morte, mais le juge est vivant." Cf. M. Pinto, "La Cour Supreme et le New Deal" (1938), p. 136.

6. "The Supreme Court and the Superstructure of the Constitution" (1930) 16 Amer. Bar. Assn. Jour. 565.

7. I assume a jurisdiction, both State and Federal, where the courts have authority to employ "three strikes" with respect to legislation, i.e., construction, application, and constitutionality.

8. Frankfurter, "Mr. Justice Holmes and the Constitution" (1927) 41 Harv. L. Rev. 121.

9. F. R. Black, "Judicial Mileposts on the Road to Absolutism" (1931) 25 Ill. L. Rev. 911, 27 Ill. L. Rev. 511 (1933), and 23 Ky. L. J. 69 (1934).

10. "Streamlining the Constitution" (1938) 16 N. Y. U. L. Q. Rev. 1.

11. Cf. my volume 1 of "Cases on Constitutional Law" (1930), containing a Foreword by Congressman Beck.

12. Judge Cooley said: "We may think we have the Constitution all before us; but for practical purposes the Constitution is that which the government in its several departments and the people in the performance of their duties as citizens recognize and respect as such; and nothing more." Lord Bryce, supra, note 1, p. 400.

13. Brandeis, J., in the Burnet Case, supra, note 3, said: "The judgment of the Court in the earlier decisions may have been influenced by prevailing views as to economic or social policy which have since been discarded." And cf. also Roscoe Pound, "The Theory of Judicial Decision" (1923) 36 Harv. L. Rev. 641, 651.

for it never really ceases to be, in that the physical stimuli of external environment have their inevitable reaction upon the mental processes of the judges.

Nature of the Judicial Instrument

Mankind sees its problems and their solution in terms of the dominant thought processes of each age and the limited and prescribed knowledge of that age. Human beings are enmeshed in the radioactive or electrical "wave-lengths" of their own times translated into general and accepted viewpoints of science, law, society, and government.[14] All knowledge comes from experience, so that "reason" as men know it is stored-up sense experience, co-ordinated and organized, in the Kantian sense, by the "categories" of the human mind.[15] Judges being human react in accordance with these laws of epistemology, these limitations of the knowing instrument, and become conduits through which the interpretative process of the Constitution emanates. They also draw sensory stimuli from the contacts of their age, its dominant activities and thought processes. The death of one age is the birth of the next, but the older conceptions of the preceding age tend to linger and come into conflict with those of the succeeding one.[16] Some judges, as they advance in age and as their "arteries harden,"—and this observation is not made with disrespect—dislike the thought processes of the younger generation; with their advancing age there is more inertia, more longing for stability and repose, less likelihood to welcome innovations.[17] The dominant activities and thought processes of the age in which these older jurists[18] flourished and played their role, and subscribed to the styles in dress and thought also then dominant, are not the same of the following era, and particularly not if the latter is a dynamic and restless, a "quick and active" one.[19] An age of individualism is not the same as one of paternalism; an age of minimum government is not similar to that of maximum government. The major premises are fundamentally different. Because of other factors in society pressing for recognition, the underlying current of human activity may have either disappeared or changed direction from that of an earlier generation. It is of the essence of life that it does not remain static,[20]—styles in dress, in thought, in government and its functions come and go. However, this is not to say that certain ethical and governmental principles are not fundamental and, from history, demonstrated to be pragmatically most useful for society.

Thus it follows that judges see the Constitution "as through a glass darkly," in terms of their own experience as lawyers, administrators, and politicians before they ascended the bench.[21] It is impossible for the judge to discard his stored-up sensory experience which has become crystallized into "rationality" as he understands it; in truth, this unitary complex is his own unique personality which differentiates him from other human beings. Earlier judges[22] in our national history, springing from an environment of individualism and self-reliance, construed the Organic Law in such fashion as to cabin and confine government in narrow limits; this was but "reason" in their eyes. In their view, men did not "belong to the State," but the State belonged to men as their servant. Basic and eternal principles governed in the affairs of men and controlled government as a "higher law" above a constitution. That government was best which governed least. The individual stood alone and made his way in the world unaided by government, but to be protected by the Constitution against government when it invaded the realm of his fundamental rights *qua* person. Private law would furnish similar protection against the unlawful acts of "pressure groups" unconnected with government. As styles in dress and personal appearance were different in earlier generations from those prevailing today, so the thought processes and attitudes toward the Constitution were unlike the majority conceptions of the present. Is there not a connection between the stern visages and patriarchial appearance of older justices on the Supreme Court—as seen in numerous composite photographs of them in earlier days—and their more "orthodox" constitutional interpretations? Coupled with these external influences were those originating in the inherent varying mental characteristics of judges,[23] who were metaphysicians, historians, logicians, "equity intuitionists," or "practically-minded," and thus because of their diversities gave a composite construction of the Constitution unlike some of that prevailing in the present. Their mental horizons also were not as far-reaching as may be those of our own generation with the lessons of history behind them and with most intricate problems of government and capitalism before them, not to mention the mistakes of these institutions. The close interrelation between the epistemological nature of judges as human beings and the interpretative process of the Constitution must be evident. A similar relationship must also be recognized between the dominant social and economic activities and their impact upon the Constitution through the judges.

Where the "Revised Version" of the Constitution Is Marked

Obviously the Constitution, because of its flexibility,

14. "Current Constitutional Fashions" (1940) 34 Ill. L. Rev. 519.

15. Carr, Psychology, ch. 8, "The Nature and Function of Ideas," p. 164; Pillsbury, The Psychology of Reasoning, ch. 3; Dewey, How We Think, ch. 6. Modern psychologists would talk in terms of "synaptic" connections, rather than "categories" of the mind.

16. The clash between Oriental and Greek cultures resulted in a synthesis of the all-powerful State of the former and the individualism of the latter. The Hegelian principle of thesis, antithesis, and synthesis is also illustrated in the clash of civilizations of the Grecian, Roman, and Christian eras. It has been urged that today we are witnessing such a synthesis in a "mixed economy" of Capitalism and Socialism. Cf. John Chamberlain, "Toward a Permanent NEP," (The New Republic, Feb. 5, 1940).

17. "In spite of the many notable exceptions to be found among men and women in public life, the popular impression that elderly persons tend to be more conservative, more reactionary, more intolerant of changes in manners, morals, religion and politics than are their juniors, is probably correct." E. V. Cowdry, "Problems of Ageing" (1939) p. 467. For detailed bibliography, cf. pp. 481, and 496-500.

18. These qualities are necessary "to determine whether the thoughts which the young men are bringing to the light are false idols or true and noble births. . . . When enthusiasm and experience are most evenly balanced productivity is maximal." Cowdry, supra, note 17, p. 562.

19. Mr. Justice Matthews writing in 1884 regarded that era as a "quick and active one." *Hurtado v. California* (1884) 110 U. S. 516.

20. Commenting upon the inevitability of change in mundane affairs, Cardinal Newman said: "In a higher world it is otherwise, but here below to live is to change, and to be perfect is to have changed often." "Essay on Development," p. 39.

21. Holmes, J., dissenting in *Baldwin v. Missouri* (1930) 281 U. S. 586, 595.

22. For a case study of some of these judges, cf. C. B. Swisher, "The Life of Stephen J. Field" (1930); ibid., "Roger Taney" (1935); F. B. Clark, "The Constitutional Doctrines of Justice Harlan" (1915); A. Lief, "The Social and Economic Views of Mr. Justice Brandeis" (1930).

23. "Constitutional Casuistry" (1933) 27 Ill. L. Rev. 261.

will yield more under judicial construction to the impact of those forces within our times which are dominant and irresistible than to those which are otherwise. I find in the field of economic and social relations, due to business depression, and in that of extension of governmental regulation, because of a unifying nationalism incident to industrialism, the influences that have occasioned a revision of the "judicial" Constitution. There are some minor developments intertwined which stem from the conception of the essential unity of governmental activities despite State lines and the Tenth Amendment. I do not, on the other hand, find much revisionist influence operative in so far as the application of the "Bills of Rights" may be concerned; in fact, I find a strengthening and even an enlargement[24] of these basic protections as interpreted by the Supreme Court—a field of inquiry not pertinent to the present study.

A cross-section of the strata underlying the "revised version" of the Constitution will disclose the following: I. The "Liberty of Contract" Revision; II. Revision of the Interstate Commerce Formula; III. The "Revised Version" of Federalism; IV. Erosion of the Reciprocal Immunity from Taxation Doctrine; V. Recognition of the Unity of Judicial Interpretation in Federal and State Courts; VI. Revision of the Older Conceptions of the Functions of Government. Each of these will be discussed *seriatim*.

I.

The "Liberty of Contract" Revision

The formula "liberty of contract" stems from judicial construction of the "due process" clauses of the Fifth and Fourteenth Amendments; it does not expressly occur in the Constitution. This formula was often employed by justices in the Supreme Court to invalidate social and economic legislation which a majority of such justices regarded as violative of the "fundamental personal rights" of those regulated, hence repugnant to "due process" of law. Within recent times the formula has been considerably revised with respect to regulations of law imposed upon the employing class as well as upon those who sought to accomplish objectives regarded by government as inimical to the general welfare. The justices of a generation ago, in 1908[25] and 1915[26] in particular, striking down State and Federal legislation which forbade an employer to discharge, or discriminate in hiring against, any "union" worker, did so because of grave interference with the constitutional right of "liberty of contract." But a majority of the justices in 1937[27] sustaining such legislation—except for non-criminal penalties—acted upon the simple ground that the prior precedents were "inapplicable to the present circumstances." The span of the years tells a powerful story. Where the former justices saw an end to freedom and liberty and the growth of tyranny both governmental and private because of increasing unionism under sponsorship of government itself, the later justices found no especial ground of fear or worry, especially so since the employer might place his reasons for discharge or discrimination upon other valid grounds, and also because there was no compulsion of law upon him to employ union members. And so in connection with the

24. *Schneider v. State* (1939) 60 S. C. Rep. 146, 84 L. Ed. 115.
25. *Adair v. U. S.* (1908) 208 U. S. 151.
26. *Coppage v. Kans.* (1915) 236 U. S. 1.
27. *National Labor Relations Bd. v. Jones & Laughlin Steel Co.* (1937) 301 U. S. 1.

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EDWIN F. ALBERTSWORTH

imposition upon the employer of minimum wages for certain employees in the lower brackets of income, where former justices[28] saw grave danger to the constitutional right of "liberty of contract," in that fixation of minimum wages would also permit maximum wages by law, later justices[29] were unimpressed in that the employer might still refuse to employ workers in the lower scales of income or any number of them. Thus the Constitution in these respects meant one thing to an earlier generation, and a different one later, due entirely to altered judicial viewpoints in majority opinions. Discussion is not here permissible of other developments, nor the factors which occasioned this judicial change of front resulting in a "revised" conception of the "liberty of contract" formula, with a necessarily "revised version" of the Constitution.[30] Nor can I here explore the economic effects of such a judicial revision upon employment, investments, labor disturbances, and continuance of economic depression through lack of confidence of private capital in the protective safeguards of the Constitution as heretofore regarded.[31] I merely describe this "revised version" of the Constitution through judicial interpretation.

II.

Revision of the Interstate Commerce Formula

The powers of the Central Government have been expanding into those of the several States for a half century, but during the decade of economic depression

28. *Adkins v. Children's Hospital* (1921) 261 U. S. 525 and *Morehead v. N. Y.* (1936) 298 U. S. 587.
29. *West Coast Hotel Co. v. Parrish* (1937) 300 U. S. 379.
30. Cf. supra, note 10.
31. "Capital Insecurity Under the Constitution" (1939) 27 Georgetown Univ. L. J. 261.

beginning with 1929 they received added impetus. This was due in part to the planned economy conceptions holding sway in the country, seeking aid from government when private capital was timid or scarce, and to the notion that government could through law control surpluses, commodity prices, and provide parity between industrial and agricultural price levels.[32] State lines were to be only "geographical expressions." In sustaining the power of Congress to bring together employers and employees around the "bargaining table" whenever disputes arose between them, the Court predicated its reasoning upon the constitutional power in the Central Government—so declared in the legislation—to remove obstructions upon the free flow of interstate commerce.[33] While, as a constitutional concept, this was not a discovery or an innovation, nonetheless in applying it to businesses heretofore regarded as basically "intra-state" in character, but now as "within the stream" of interstate commerce in certain instances, the Court judicially "revised" the formal Constitution accordingly.[34] Numerous questions arose from this extension of the formula "protection against obstructions" to interstate commerce, among them being how far the Central Government might in future regulate other phases of such businesses apart from labor disputes, or to what extent aggregations of employees might also be controlled by federal power. Have new "instruments of power"—as yet not discernible—been fashioned by Government, and approved by the Court through constitutional construction, which may be a yoke upon business and labor, to be applied by another generation?

Employing another judicial formula—known in constitutional parlance as "the throat of the bottle"—the Court has sustained Congressional power in heretofore regarded intra-state fields when products have been shipped *through* the "throat," such as boards of trade, stockyards, and warehouses.[35] Where older decisions had justified regulation of the activities *at* the "throat," the more recent precedents have extended federal regulatory power into the hinterland from which the products in the stream of commerce originated.[36] The growing of crops and animals may conceivably come under federal regulation and control where their shipment affects the stream of interstate commerce.

Moreover, older decisions in the Court, striking down federal power excluding commodities from the channel of interstate commerce when produced by child labor[37] or in excess of fair labor standards,[38] cannot longer be relied upon as stating the exact law and the present meaning of the Constitution. In fact, throughout the entire field of interstate commerce, new points of view and new applications[39] are in existence, both in legislative and judicial circles and in the popular mind. These result in a "revised version" of the Constitution because of their impact. The Tenth Amendment is in retreat before this federal advance.

32. Cf. *U. S. v. Butler* (1936) 297 U. S. 1.

33. Supra, note 27.

34. This is exemplified by the strong dissenting opinions in all the cases involving the various phases of federal jurisdiction under the National Labor Relations Act.

35. *Stafford v. Wallace* (1922) 258 U. S. 495 and *Board of Trade v. Olsen* (1923) 262 U. S. 1.

36. *Mulford v. Smith* (1938) 307 U. S. 38, and cf. Slusser, "The National Labor Relations Act: Is It Tolerable" (1939) ch. 14.

37. *Hammer v. Dagenhart* (1916) 247 U. S. 251.

38. *Bailey v. Drexel Furniture Co.* (1922) 259 U. S. 20.

39. *Whitfield v. Ohio* (1936) 297 U. S. 431; *Kentucky Whip & Collar Co. v. Ill.* (1937) 299 U. S. 334.

III.

The "Revised Version" of Federalism

The fundamental philosophy of the Constitution that the Federal Government, unlike that of the several States, is one of delegated limits, has been undermined during the past decade of economic depression. Continual federal spending through deficit financing to relieve economic distress and to stimulate industrial recovery, has inculcated a popular conception that federalism as a form of government is, and ought to be, extinct or considerably changed. It has been asserted that State equality of power with the Federal Government once had its usefulness, but today should yield in many particulars to the "paramount federal authority." Since the Central Government in contrast with the several States had, unlike the latter, unlimited debt-incurring power, it was natural to "face east" to Washington for disbursement of funds.[40] In the granting and lending of such funds, the Federal Government predicated its claim to constitutional power upon grounds of "providing for the general welfare" or the disposal of its own "property." In the process, the Government attached to its bounties various restrictions to be observed by the recipients, resulting in the "purchase" by Government of regulatory areas formerly reserved to the several States.[41] And in the allotment of contracts for performance of necessary and "orthodox" federal functions, the Government stipulated that the contractors observe federal regulations as to hours, wages, standards of conduct, et cetera, which, apart from such consent and under earlier constructions of the Constitution before the advent of hyper-governmental activity, the Government could not have required by compulsion of law.[42] Allegation also of "emergency"[43] conditions on the part of Congress and President, under which the idea was conveyed that constitutional restrictions as to want of power in the Central Government would be at minimum, further indoctrinated the American public with unified nationalism as contrasted with "federalism." Wherever the Supreme Court sought to check prevalent tendencies away from federalism, it incurred disfavor among great numbers, so that it became popular to criticize the Court as an obstructive force in the American system. Attempts to "pack" it resulted, and were defeated in part when a majority of the justices in important social and economic decisions decided, temporarily at least, not to frustrate this trend manifest in the country.[44] Constitutionalism and the niceties of jurisdiction between Federal and State Governments were not of importance in popular and legislative thinking, nor indeed eventually in the judiciary. What was important to many was whether or not industrial revival eventuated through governmental efforts, or whether the recipients in the underprivileged groups were prevented from "revolting"[45] against government and obtaining or demanding some other type. A centralized, powerful Government, acting summarily without too much con-

40. O. R. McGuire, "The Achilles Heel of Constitutional Government in America" (1939) 46 W. Va. L. Q. 47.

41. Cf. *U. S. v. Butler*, supra, note 32. And *Duke Power Co. v. Greenwood County* (1936) 299 U. S. 259.

42. As under the Walsh-Healey Act, 9A, F. C. A. Tit. 41, sec. 35.

43. As, for example, sec. 606(c) of the Communications Act of June, 1934, 48 U. S. St. at L. 1064, at pp. 1104-05.

44. Cf. supra, note 10.

45. For this viewpoint, I cite without endorsing it, George Soule's "The Coming American Revolution" (1936), ch. 3, "The Crisis of the Thirties."

stitutional restraint, was believed to be the best agency under such conditions. The impact of this dominant belief and activity was inevitable upon judicial interpretation, with resulting further "revision" of the Constitution.

IV.

Erosion of the "Reciprocal Immunity from Taxation" Doctrine

The dual immunity of Federal and State governments and their employees from taxation took its origin in judicial interpretation; it is not expressly found in the Constitution. Chief Justice Marshall reached the immunity conclusion[46] by reasoning that each government, Federal or State, was supreme in its own sphere so that invasion into the realm of either by taxation implicitly carried with it the "power to destroy." Thus, what the Court created out of whole cloth in its opinions could also be taken away in the same manner. The recent trend in the Court from absolute immunity to a partial one came gradually and was part and parcel of the weakening of federalism, already discussed. In refusing to construe the authority of the Federal Government over foreign commerce as bound by the dual immunity taxing power,[47] the Court soon thereafter, expressly overruling earlier judgments,[48] permitted federal taxation of State activities—not of a "governmental" character—and State taxation of federal employees.[49] An impelling reason for this judicial change of front was likely due in part to the impact of governmental needs for increased revenue because of large-scale spending of funds by both Federal and State Governments.[50] Whether or not entry of governments into business incident to attempts to effectuate industrial recovery was a motivating factor is problematical. Undoubtedly if the dual immunity doctrine were still efficacious, the withdrawal of large areas from taxation would be possible,[51] with a consequent rise in the tax assessment rolls to private parties. Moreover, the justices may have felt that with the increased costs of government in general, employees of both Federal and State governments should likewise share in the burdens through reciprocal taxation. In any event, it must not be overlooked that judicial revision of the Constitution is here in process and the leaven now at work has many possibilities.

V.

Recognition of the Unity of Judicial Interpretation in Federal and State Courts

Since the foundation of the Republic until the overruling decision in *Erie Railway v. Tompkins* of 1938,[52] a distinct cleavage had existed between federal and State courts with respect to decisions on so-called matters of "general law." Mr. Justice Story in *Swift v. Tyson*,[53] decided 1842, held that the "laws of the several States" which Congress directed the federal judiciary to follow under the "Uniformity of Decisions Act" were not inclusive of judicial decisions of the highest State courts on so-called "general" questions. Subsequently, dissenting opinions in the Court, especially by Justices Holmes and Brandeis,[54] adopted the position that an unconstitutional practice resulted from this "general law" said to exist in the federal judiciary apart from that existing in the several States. Because of the nature of federalism, there being no "general law" delegated to the Central Government under the Constitution these dissenting justices found no authority in the federal courts to create one by refusing to follow the decisions of the highest State courts on all matters except federal questions. In *Erie Railway v. Tompkins* the "stone which the builders rejected" became "the headstone of the corner."[55] Ninety-six years of procedure and practice predicated upon alleged constitutional grounds thus disappeared through judicial demolition of the "general law" concept. The Constitution in this regard underwent substantial revision. It was in part motivated upon the ground that within the several States, both in their courts and those of the Federal Government therein established, there should be, despite federalism as a form of governmental structure, a unity of judicial interpretation—barring federal questions—because of the essential unity of justice.[56]

VI.

Revision of the Older Conceptions of the Functions of Government

The ravages from a decade of economic depression with its unemployment and human misery, have caused a re-examination of the older conceptions of the functions of government in the United States, with resulting impact upon constitutional interpretation. The inability or unwillingness of private capitalism to effectuate sustained industrial revival occasioned on the part of many a turning to government, especially the Federal Government, for solution of economic difficulties and for financial assistance. Economic security through government rather than through private initiative became the popular program, and equally so governmental spending and lending with the hope of generating business revival. As governmental credit appeared inexhaustible and as excessive taxation was neither popular nor wise because deterring business revival, borrowing by government in excess of income became accepted fiscal policy.[57] Government loaned and granted its funds on a widespread scale to States, cities, and private individuals in order to furnish purchasing power in heavy industries, while doles to millions upon relief sought to stimulate consumer purchasing power and to alleviate human distress. Government itself engaged in numerous forms of business activity.[58]

At the threshhold of 1940, then, we find in Supreme Court interpretation of the resulting constitutional issues arising from this hyper-governmental activity but little, if any, effective opposition. The governmental trend to, and practice in, many fields of Socialism, reflects a basic philosophy of government as active and militant, carrying out a planned economy, whether or

(*Continued on page* 351)

46. In *McCulloch v. Maryland* (1819) 4 Wheat. 316.
47. *Bd. of Trustees of Univ. of Illinois v. U. S.* (1933) 289 U. S. 48.
48. *Helvering v. Mt. Producers' Corp.*, supra, note 3. And *Helvering v. Gerhardt* (1938) 304 U. S. 405.
49. *Graves v. O'Keefe* (1939) 306 U. S. 466.
50. McGuire, supra, note 40, p. 60.
51. Cf. pending Norris Bill in the U. S. Senate to increase the amount to the State of Tennessee now voluntarily paid by the T.V.A.
52. 304 U. S. 64.
53. 16 Peters 1.
54. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Cab. Co.* (1928) 276 U. S. 518.
55. McCormick, "The Collapse of 'General Law' in the Federal Courts" (1939). 33 Ill. L. Rev. 126.
56. The new Rules of Procedure as formulated by the Supreme Court of the United States implement this trend.
57. Cf. "Capital Insecurity Under the Constitution," supra, Note 31.
58. Cf. McGuire, supra, note 40.

YOUR SURROGATE - QUÉ HOMBRE!

1. Interrogate
Your Surrogate
Re points you flunked in college.
He's just that kind
Of "greasy grind"
Who's full of Blackstone knowledge!

2. Appreciate
Your Surrogate
In every term and season!
If you but ask
He'll aid your task
And make quite clear his reason!

3. This legal ace
With ease and grace
Steers us with rare acumen
Your thanks, with vim
Are due to him -
Remember he's but human!

4. To save your face
Prepare your case -
Lest he surmise your tangle.
Play fair the game,
He'll do the same
And help from every angle!

5. His skill and tact
With law and fact
Elicit admiration!
But - don't provoke -
Lest lightning stroke
Bring sudden consternation!

6. That good old scout
Day in, day out,
Gulps question after question.
'Tis wonder he
Is ever free
From mental indigestion!

7. He handles grief
Beyond belief
Hard problems haunt his pleasure.
Both just and kind
His watchful mind
Stands guard o'er family treasure!

8. Your Surrogate
Toils long and late -
Such zeal prompts imitation!
He champions right
In daily fight!
God speed his great vocation!

—*Charles T. Lark*

(On the occasion of the dinner to Surrogates at the Association of the Bar, New York City, January 30th, 1940.)

REVIEW OF RECENT SUPREME COURT DECISIONS

Labor Union Has No Standing to Press Contempt Charges for Violation of Court Decree Enforcing N. L. R. B. Order—National Labor Relations Act Not for Adjudication of Private Rights—Sec. 67 (f) of Bankruptcy Act Does Not Automatically Discharge Liens for Income Tax Purpose—Settlor May Still be Considered Owner in Short-Term Family Trust—State Statute of Limitations Not Necessarily Applicable in Federal Equity Suit—Appeals from Orders Under Ch. X of Chandler Act—Criminal Appeals—Venue and Limitations in Board of Tax Appeals Matters—Licenses of Citrus Fruit Dealers: Injunctions: Constitutional Law—Longshoremen's Cases—State Law on "Psychopathic Personalities" Upheld

By Edgar Bronson Tolman*

National Labor Relations Act—Standing of Labor Union to Press Charge of Civil Contempt.

Under the National Labor Relations Act, the Labor Board alone is authorized to take proceedings for the enforcement of its orders. When the Board has obtained a decree of a Circuit Court of Appeals for the enforcement of its order, a labor union has no standing to press a charge of civil contempt against an employer for the employer's alleged contempt of the judicial decree made to enforce the order of the Board.

Amalgamated Utility Workers v. Consolidated Edison Co. of N. Y., Inc., 84 Adv. Op. 493, 60 Sup. Ct. Rep. 561. (No. 342, decided February 26, 1940.)

This opinion deals with a question as to the standing of a labor union to press a charge of civil contempt against an employer for alleged contempt of a judicial decree made to enforce an order of the National Labor Relations Board.

The Board ordered the respondent and its affiliates to desist from labor practices found to be unfair and to take certain affirmative action, and the Circuit Court of Appeals granted a decree to enforce the order. The petitioner later brought a proceeding in the Circuit Court of Appeals to have the employer companies adjudged in contempt for failure to comply with certain requirements of the court decree affirming the Board's order.

The Board responded to the motion by stating its willingness to participate in an investigation of the alleged violation of the decree, but the Circuit Court of Appeals denied the application on the ground that the petitioner has no standing to press a charge of civil contempt. On certiorari this was affirmed by the Supreme Court in an opinion by Mr. Chief Justice Hughes.

In dealing with the question, the opinion considers the contention of the petitioner that the Act creates private rights as to self-organization and collective bargaining. This contention is rejected with the observation that the right to organize and select representatives for lawful purposes is fundamental and cannot properly be said to have been created by the Act. It is noted further that discrimination and coercion to prevent the free exercise of these rights by the employees are proper subjects for control by legislation. In recognition of the right Congress undertook to make collective action an instrument of peace rather than of industrial strife by the enactment of the Act.

An analysis of the Act then follows from which it is concluded that the National Labor Relations Board is made the exclusive agency for ascertaining and preventing the unfair labor practices condemned by the Act.

In this connection, reliance is placed particularly on Section 10 (a), which provides:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

The procedure prescribed by the Act is then outlined as follows in the opinion:

> "The Act then sets forth a definite and restricted course of procedure. A charge of an unfair labor practice may be presented to the Board, but the person or group making the charge does not become the actor in the proceeding. It is the Board, and the Board alone or its designated agent, which has power to issue its complaint against the person charged with the unfair labor practice. If complaint is issued, there must be a hearing before the Board or a member thereof or its agent. The person against whom the complaint is issued may answer and produce testimony. Other persons may be allowed to intervene and present testimony, but only in the discretion of the Board, or its member or agent conducting the hearing. Section 10 (b). The hearing is under the control of the Board. The determination whether or not the person named in the complaint has engaged or is engaging in the unfair labor practice rests with the Board. If the Board is of the opinion that the unfair labor practice has been shown, the Board must state its findings of fact and issue its 'cease and desist' order with such affirmative requirements as will effectuate the policy of the Act. Section 10 (c).
>
> "So far, it is apparent that Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or group, not any employee

(Note: All Supreme Court decisions rendered from the recessing of Court on Feb. 12, 1940 up to and including Monday, March 11, are reviewed or summarized in this issue of the Journal. On March 11 the Court recessed to March 25.)

*Assisted by James L. Homire and Leland F. Tolman.

or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.

"When the Board has made its order, the Board alone is authorized to take proceedings to enforce it. For that purpose the Board is empowered to petition the Circuit Court of Appeals for a decree of enforcement. The court is to proceed upon notice to those against whom the order runs and with appropriate hearing. If the court, upon application by either party, is satisfied that additional evidence should be taken, it may order the Board, its member or agent, to take it. The Board may then modify its findings of fact and make new findings. The jurisdiction conferred upon the court is exclusive and its decree is final save as it may be reviewed in the customary manner. Section 10 (e). Again, the Act gives no authority for any proceeding by a private person or group, or by any employee or group of employees, to secure enforcement of the Board's order. The vindication of the desired freedom of employees is thus confided by the Act, by reason of the recognized public interest, to the public agency the Act creates. Petitioner emphasizes the opportunity afforded to private persons by Section 10 (f). But that opportunity is given to a person aggrieved by a final order of the Board which has granted or denied in whole or in part the relief sought. That is, it is an opportunity afforded to *contest* a final order of the Board, not to *enforce* it. The procedure on such a contest before the Circuit Court of Appeals is assimilated to that provided in Section 10 (e) when the Board seeks an enforcement of its order. But that assimilation does not change the nature of the proceeding under Section 10 (f), which seeks not to require compliance with the Board's order but to overturn it."

The Court observes that the text of the Act is so clear on this subject that resort to legislative history is unnecessary in arriving at the correct interpretation. However, a brief reference is made to legislative reports made in connection with the Act to support the view adopted by the Court.

An analogy is also drawn to the procedure under the Federal Trade Commission Act, particularly as discussed in *Federal Trade Commission v. Klesner,* 280 U. S. 19.

MR. JUSTICE MURPHY took no part in the decision of this case.

The case was argued by Mr. Louis B. Boudin for the petitioner, and by Mr. William L. Ransom for Consolidated Edison Co. and by Mr. Isaac Lake Strauss for International Brotherhood of Electrical Workers.

National Labor Relations Act—Power of Board to Prevent Unfair Labor Practices.

The National Labor Relations Board has power to direct an employer to desist from dominating and interfering with the administration of an employee's bargaining committee, to order the employer to bargain collectively, on request, with a union representing a majority of its employees, to withdraw recognition from a committee dominated by the employer, and to post notices in the plant that certain individual contracts of employment were made in violation of the Act, and that the employer will no longer attempt to enforce them, but that such non-enforcement is without prejudice to the rights of the employees under the contracts.

National Licorice Co. v. National Labor Relations Board, 84 Adv. Op. 533; 60 Sup. Ct. Rep. 569. (No. 272, decided March 4, 1940.)

The principal question in this case concerns the authority of the National Labor Relations Board to order an employer not to enforce contracts with its employees which were procured in violation of the Labor Act and contain provisions violating the Act, in the absence of the employees as parties to the proceeding.

The opinion of the Court, delivered by MR. JUSTICE STONE, sets forth in detail the findings of fact of the Board, as well as its legal conclusions thereon.

The controversy arose out of the efforts of the Bakery & Confectionery Workers International Union of America, Local Union No. 405, an affiliate of the American Federation of Labor, to unionize the petitioner's plant. The Union obtained signatures of 99 of 140 of the petitioner's employees. The employer refused to negotiate with the Union as the collective bargaining agent of the employees, other than those who had joined the union. While efforts to bring about collective bargaining negotiations were being made by the Union, a strike developed which the Board found to be due to spontaneous dissatisfaction of the employees over the progress of the negotiations. Through a Committee of three employees the strike was settled and the men went back to work. The resumption of work, however, was made under separate and individual contracts of employment which were signed individually by 118 employees and the Committee of three. Under the settlement certain concessions were made to the employees. The contract provided for arbitration of disputes over wage rates and hours of employment, but stipulated that the "question as to the propriety of an employee's discharge is in no event to be one for arbitration or mediation. . . ." The Board concluded on this and other findings that petitioner, by refusing to bargain collectively with the Union, had engaged in unfair labor practices in violation of Sec. 8 (5) of the Act; that petitioner by coercion and intimidation against self-organization and collective bargaining and against joining the union and compelling the signing of individual employment contracts had violated Sec. 8 (1) of the Act; and that by fostering and dominating the collective bargaining Committee, petitioner had acted in violation of Secs. 8 (1) and (2) of the Act.

The Board directed that the employer desist from the practices found to be unfair and ordered affirmatively that the petitioner bargain collectively with the Union, withdraw recognition from the Committee and inform the Committee and employees who had made individual contracts that "such contract constitutes a violation" of the Act; that employees are relieved from all obligation under the contract; that petitioner would no longer demand performance of the contract; and, finally, that petitioner post appropriate notices.

The Circuit Court of Appeals of the Circuit, on petition of the Board, decreed enforcement of the order with a modification, however, to the effect that an election be held to determine whether the Union is still the bargaining representative of the majority of the employees.

On certiorari the Supreme Court affirmed the order of the Circuit Court of Appeals with a modification to be noted hereinafter.

In dealing with the question of the propriety of the Board's order concerning the individual contracts of employment, the Court recognizes that they were the fruits of unfair labor practices. Also that it is not within the power of a tribunal to make a binding adjudication of rights *in personam* of parties not brought before it by due process of law. The conclusion is reached that the Board's order to post notices should be changed in so far as it declares that the contracts with the employees are "void and of no effect." The opinion states

further that the notices should be amended to omit the words last quoted and to add also the following:

"(3) that the individual contracts of employment entered into between the respondent and some of its employees were made by the respondent in violation of the National Labor Relations Act; and that the respondent will no longer offer, solicit, enter into, continue, enforce, or attempt to enforce such contracts with its employees; but this is without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts."

In reaching this conclusion on this aspect, however, the Court supports the power of the Board to protect the public interest and to effectuate the purpose of the Act to eliminate and prevent obstructions to interstate commerce through the encouragement of collective bargaining and related devices designed by the Act. In this connection, MR. JUSTICE STONE says:

"The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. . . It has few of the indicia of a private litigation and makes no requirement for the presence in it of any private party other than the employer charged with an unfair labor practice. The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining and by protecting the 'exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment. . . .' § 1. The immediate object of the proceeding is to prevent unfair labor practices which, as defined by §§ 7, 8, are practices tending to thwart the declared policy of the Act. To that end the Board is authorized to order the employer to desist from such practices, and by § 10 (c) it is given authority to take such affirmative remedial action as will effectuate the policies of the Act. . . .

"In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights. Ordinarily where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it. . . . Such a judgment or decree would be futile if rendered, since the contract rights asserted by those present in the litigation could neither be defined, aided nor enforced by a decree which did not bind those not present.

"But different considerations may apply even in private litigation where the rights asserted arise independently of any contract which an adverse party may have made with another, not a party to the suit, even though their assertion may affect the ability of the former to fulfill his contract. The rights asserted in the suit and those arising upon the contract are distinct and separate so that the Court may, in a proper case, proceed to judgment without joining other parties to the contract, shaping its decree in such manner as to preserve the rights of those not before it. . . .

"Here the right asserted by the Board is not one arising upon or derived from the contracts between petitioner and its employees. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. The public right and the duty extend not only to the prevention of unfair labor practices by the employer in the future, but to the prevention of his enjoyment of any advantage which he has gained by violation of the Act, whether it be a company union or an unlawful contract with employees, as the means of defeating the statutory policy and purpose. Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes or by insisting, more than in a private litigation, that the employer's obedience to the Act cannot be compelled in the absence of the workers who have thus renounced their rights."

Also considered in the opinion was the petitioner's contention that the Board lacked jurisdiction to make the challenged order because the complaint was not restricted to the unfair labor practices alleged in the charge lodged with the Board. The Court finds it unnecessary to go into the question as to how far the statutory requirement of a charge as a condition precedent to the complaint excludes from subsequent proceedings matters existing when the charge was filed but not included in it. It is found in the instant case that there is nothing in the Act to preclude the Board from dealing adequately with unfair labor practices which are related to those set forth in the charge and which grow out of them while the proceeding is pending before the Board.

MR. JUSTICE MURPHY took no part in the decision of the case.

MR. JUSTICE DOUGLAS and MR. JUSTICE BLACK were of the opinion that decision should be reserved on the question of the rights of employees under the individual contracts until the same are put in issue by persons having standing to raise any issue as to them.

The case was argued by Mr. Abram Mann for the petitioner, and by Mr. Robert B. Watts for respondent.

Bankruptcy—Construction of §67(f) of the Act of 1898.

By virtue of §67(f) of the Bankruptcy Act of 1898 a lien on property is not automatically released by reason of an adjudication in bankruptcy of the owner of the property within four months of the obtaining of the lien, but is discharged only under the conditions specified and may be preserved for the benefit of the bankrupt's estate if the trustee in bankruptcy so elects.

Fisher v. Pauline Oil & Gas Co., 84 Adv. Op. 499, 60 Sup. Ct. Rep. 535. (No. 239, decided February 26, 1940).

Certiorari was granted to determine whether, by force of § 67 (f) of the Bankruptcy Act of 1898 the adjudication in bankruptcy automatically discharges the lien of a levy on real estate irrespective of any action on the part of the trustee in bankruptcy.

The question arose in an action by petitioner to quiet his title to an oil and gas lease which was based on a sheriff's deed under a judgment made on an award of the State Industrial Commission against Geraldine Oil Company. The respondent's title rested on a conveyance by an assignee for benefit of creditors of the same company, which was confirmed by the bankruptcy court.

The assignment for creditors occurred October 11, 1934, when the Geraldine Company was insolvent. The award of compensation became a judgment on its filing on December 8, 1934.

June 21, 1935, the assignee for the benefit of creditors sold the property to the respondent. September 13, 1935, execution was issued on the compensation judgment and the sheriff levied on the property as belonging to the Geraldine Company on September 17th.

October 24, 1935, the Geraldine Company was adjudged a voluntary bankrupt. November 12, 1935, the sheriff sold the property under execution and the petitioner bought it. At the sale a notice of the bankruptcy

adjudication was read in the petitioner's presence and the same day the sheriff made return of the sale to the court.

November 21, 1935, the trustee in bankruptcy filed objections to the confirmation of sale on the ground, among others, that the Geraldine Company was insolvent when the compensation judgment was rendered and had continued so ever since, and that since the adjudication in bankruptcy occurred within four months after the procuring of the lien under the execution it was, by virtue of § 67 (f) of the Act, absolutely void.

March 28, 1936, the Court ordered confirmation of the sale and granted the trustee in bankruptcy an exception to its action. The trustee in bankruptcy never perfected any appeal from the confirmation.

June 4, 1936, the respondent petitioned the federal court for confirmation of the sale to it by the assignee for the benefit of creditors. The trustee in bankruptcy objected but later withdrew his objections and the referee made an order confirming the sale. The assignee then paid to the trustee the consideration received by him from the respondent as purchaser at the assignee's sale. It did not appear that the petitioner had any knowledge of this application.

June 10, 1936, the Sheriff delivered a deed to the petitioner as purchaser at the execution sale.

The State Supreme Court sustained the respondent's title and held that no lien was acquired until levy of execution which occurred about a month prior to the adjudication in bankruptcy. It held the lien of the levy voided by the adjudication, by virtue of § 67 (f) of the Act.

The Supreme Court, in an opinion by MR. JUSTICE ROBERTS, reversed the judgment.

The opinion of the Court contains a review of the authorities touching the effect of § 67 (f), and it is recognized that the books contain statements of both the Supreme Court and the lower federal courts in support of the notion that an adjudication in bankruptcy ruptcy under that section automatically discharges the lien of a levy irrespective of any action on the part of the trustee.

This view, however, is rejected by the Court, and the construction is adopted that the adjudication does not automatically discharge the lien, but that its discharge is dependent upon specified conditions. In developing this position, MR. JUSTICE ROBERTS says:

> "Although § 67 (f) unequivocally declares that the lien shall be deemed null and void, and the property affected by it shall be deemed wholly discharged and released, the section makes it clear that this is so only under specified conditions. At the date of creation of the lien the bankrupt must have been insolvent; the lien must have been acquired within four months of the filing of the petition in bankruptcy; and the property affected must not have been sold to a bona fide purchaser. Furthermore, the lien is preserved if the trustee elects to enforce it for the benefit of the estate. These conditions create issues of fact which, as between the trustee, or one claiming under him, and the lienor, or one claiming by virtue of the lien, the parties are entitled to have determined judicially. The courses open to the trustee under the Bankruptcy Act of 1898 were to proceed to have the lien declared void, by plenary suit, or by intervention in the court where it was obtained, or by applying, in the bankruptcy cause, to restrain enforcement, as might be appropriate in the circumstances.
>
> "In the instant case the trustee intervened in the state court and opposed the confirmation of the execution sale on the ground that § 67 (f) had avoided and discharged the lien of the levy. The issue was decided against him and he did not appeal. Later, when the respondent, who had purchased at the assignee's sale, asked the bankruptcy court to confirm that sale, the trustee withdrew his objections to confirmation and accepted from the assignee the consideration received from the respondent as purchaser at the latter's sale. The trustee's acquiescence in the confirmation of the sale to the respondent would seem to be at least a tacit assertion that the levy of the execution did not constitute an encumbrance upon respondent's title. But we think, if in other circumstances the trustee's conduct could amount to an election to avoid the lien, it can have no such effect here, in view of the prior decision against him on that issue in the state court.
>
> "We are of opinion that the trustee, having raised the issue in the state court, was bound by the final decision of that tribunal. The estoppel of the judgment of the state court extended not only to him but to the respondent as his transferee. This conclusion requires reversal of the judgment."

MR. JUSTICE MURPHY did not participate in the decision of the case.

The case was argued by Mr. Claude H. Rosenstein for the petitioner, and by Mr. Charles E. France for the respondent.

Revenue Act of 1934—Status of Income from Short-Term Trust as Taxable Income of the Settlor.

Under § 22 (a) of the Revenue Act of 1934 the gross income of a taxpayer may include income from a short-term trust created by him for the benefit of a member of his family. Whether or not it is to be included depends on the circumstances relating to the creation and operation of the trust, particularly its short duration, the fact that the wife is the beneficiary and the retention of extensive domination and control over the corpus by the taxpayer.

Helvering v. Clifford, 84 Adv. Op. 504, 60 Sup. Ct. Rep. 554. (No. 383, decided February 26, 1940.)

This case involves a question as to whether, under § 22 (a) of the Revenue Act of 1934, income from a short-term trust created by a taxpayer is taxable as income to him.

In 1934 the respondent taxpayer declared himself trustee of certain securities which he owned. He directed that the income should be held for the exclusive benefit of his wife, and declared that the trust was to run for five years, subject to earlier termination on the death of either himself or his wife. Upon termination the entire corpus was to go to respondent, but all accrued or undistributed net income and any proceeds from the investment of net income was to be treated as property owned absolutely by his wife. During the existence of the trust the respondent was to pay to the wife all or such part of the net income as he, in his *absolute discretion*, might determine. During that time he was to have full voting power over shares of stock held in trust, broad powers of disposing and encumbering the securities in his absolute discretion, unrestricted powers of investment of the corpus or income, power to collect income, to compromise claims, to hold the trust property in the names of other persons or in his own name, except as otherwise provided. Extraordinary cash dividends, stock dividends, and certain other proceeds were to be treated as principal, not income. An exculpatory clause protected the respondent from all losses other than those due to his own wilful and deliberate breach of trust duties. Finally, it was provided that neither principal nor income should be liable for the debts of his wife, nor should the wife

transfer, encumber or anticipate any interest in the trust prior to its actual payment to her.

There was a stipulation that the tax effects of the trust were considered in creating it, but were not the sole consideration leading to its creation, as the respondent by this and other gifts intended to give security and economic independence to his wife and children. It appeared further that the respondent's wife had substantial income from other sources, was not restricted in the use of the income, intermingled it with other funds, spent it on herself, children and relatives, and that the trust was not designed to relieve the taxpayer from family or household expenses. After the execution of the trust he paid large sums from his personal funds for those purposes.

The respondent paid a federal gift tax on the transfer and during 1934 he paid the income to his wife. She included it in her individual tax return for that year. The Commissioner found a deficiency in the respondent's return for that year on the theory that the income from the trust was taxable to him. This ruling was sustained by the Board of Tax Appeals but the Circuit Court of Appeals reversed. On certiorari, the judgment of the Circuit Court of Appeals was reversed and that of the Board affirmed in an opinion by MR. JUSTICE DOUGLAS.

The controlling section, § 22 (a) of the Act of 1934, defines "gross income" as follows:

> "'gross income' all 'gains, profits, and income derived . . . from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

The opinion points out that the real issue is whether the grantor may still be treated as the owner of the corpus after the creation of the trust in the light of the statutory provision cited. The answer to that question is found to depend on the terms of the trust and the circumstances relating to its creation and operation.

In the instant case, the Court is unable to conclude, as a matter of law, that the respondent ceased to own the securities after the creation of the trust. In exposition of the Court's reasoning in reaching this conclusion, MR. JUSTICE DOUGLAS says:

> "Rather, the short duration of the trust, the fact that the wife was the beneficiary, and the retention of control over the corpus by respondent all lead irresistibly to the conclusion that respondent continued to be the owner for purposes of § 22 (a).
>
> "So far as his dominion and control were concerned it seems clear that the trust did not effect any substantial change. In substance his control over the corpus was in all essential respects the same after the trust was created, as before. The wide powers which he retained included for all practical purposes most of the control which he as an individual would have. There were, we may assume, exceptions, such as his disability to make a gift of the corpus to others during the term of the trust and to make loans to himself. But this dilution in his control would seem to be insignificant and immaterial, since control over investment remained. If it be said that such control is the type of dominion exercised by any trustee, the answer is simple. We have at best a temporary reallocation of income within an intimate family group. Since the income remains in the family and since the husband retains control over the investment, he has rather complete assurance that the trust will not effect any substantial change in his economic position. It is hard to imagine that respondent felt himself the poorer after this trust had been executed or, if he did, that it had any rational foundation in fact. For as a result of the terms of the trust and the intimacy of the familiar relationship respondent retained the substance of full enjoyment of all the rights which previously he had in the property. That might not be true if only strictly legal rights were considered. But when the benefits flowing to him indirectly through the wife are added to the legal rights he retained, the aggregate may be said to be a fair equivalent of what he previously had. To exclude from the aggregate those indirect benefits would be to deprive § 22 (a) of considerable vitality and to treat as immaterial what may be highly relevant considerations in the creation of such family trusts. For where the head of the household has income in excess of normal needs, it may well make but little difference to him (except income-tax-wise) where portions of that income are routed—so long as it stays in the family group. In those circumstances the all-important factor might be retention by him of control over the principal. With that control in his hands he would keep direct command over all that he needed to remain in substantially the same financial situation as before. Our point here is that no one fact is normally decisive but that all considerations and circumstances of the kind we have mentioned are relevant to the question of ownership and are appropriate foundations for findings on that issue. Thus, where, as in this case, the benefits directly or indirectly retained blend so imperceptibly with the normal concepts of full ownership, we cannot say that the triers of fact committed reversible error when they found that the husband was the owner of the corpus for the purposes of § 22 (a). To hold otherwise would be to treat the wife as a complete stranger; to let mere formalism obscure the normal consequences of family solidarity; and to force concepts of ownership to be fashioned out of legal niceties which may have little or no significance in such household arrangements.
>
> "The bundle of rights which he retained was so substantial that respondent cannot be heard to complain that he is the 'victim of despotic power when for the purpose of taxation he is treated as owner altogether.'"

MR. JUSTICE ROBERTS delivered a dissenting opinion in which MR. JUSTICE MCREYNOLDS concurred.

In this opinion the position is taken that the Court's decision disregards the principle that legislation is not the function of the courts but of Congress.

In development of this position, the legislative history of provisions of the various Revenue Acts is cited. Special emphasis is placed on the recommendations of the Treasury to Congress to amend the law so as to make taxable to the trustor the income from short term trusts *and* from trusts which are revocable by the trustor after the expiration of a short period. Congress adopted the recommendation as to the latter situation by adopting § 166 of the Act of 1934, but not as to the former.

Urging that the decision of the Court is unsound as constituting judicial legislation, MR. JUSTICE ROBERTS says:

> "To construe either § 166 or § 22 (a) of the statute as justifying taxation of the income to respondent in this case is, in my judgment, to write into the statute what is not there and what Congress has omitted to place there.
>
> "If judges were members of the legislature they might well vote to amend the act so as to tax such income in order to frustrate avoidance of tax, but, as judges, they exercise a very different function. They ought to read the act to cover nothing more than Congress has specified. Courts ought not to stop loopholes in an act at the behest of the Government, nor relieve from what they deem a harsh provision plainly stated, at the behest of the taxpayer. Relief in either case should be sought in another quarter.
>
> "No such dictum as that Congress has in the income

tax law attempted to exercise its power to the fullest extent will justify the extension of a plain provision to an object of taxation not embraced within it. If the contrary were true, the courts might supply whatever they considered a deficiency in the sweep of a taxing act. I cannot construe the court's opinion as attempting less."

Helvering v. Wood, No. 384, decided the same day, is a companion case to *Helvering v. Clifford,* reviewed above. In its essential features it is similar to *Helvering v. Clifford,* and involves the question whether the income from a short-term trust (not revocable by the trustor) in favor of his wife is taxable to him. The tax commissioner determined a tax deficiency against the respondent on his 1934 return but the Board of Tax Appeals and the Circuit Court of Appeals for the Circuit ruled to the contrary. On certiorari the ruling was affirmed by the Supreme Court.

In this case, however, the Government's reliance was upon § 166 of the Act of 1934 in the proceedings below rather than on § 22(a). Because of this, the Supreme Court, in an opinion by MR. JUSTICE DOUGLAS, refused to consider the respondent's alleged liability under § 22 (a).

As to the taxability of the income under § 166, the Court concludes that the Act draws a distinction between a reversion upon termination of the trust by its terms and a power to revoke, irrespective of the economic equivalence of the two. In this connection, MR. JUSTICE DOUGLAS says:

"A power to revest or revoke may in economic fact be the equivalent of a reversion. But at least in the law of estates they are by no means synonymous. For, generally speaking, the power to revest or to revoke an existing estate is discretionary with the donor; a reversion is the residue left in the grantor on determination of a particular estate. . . . Congress seems to have drawn § 166 with that distinction in mind, for mere reversions are not specifically mentioned. Whether as a matter of policy such nice distinctions should be perpetuated in a tax law by selecting one type of trust but not the other for special treatment is not for us. We have only the responsibility of carrying out the Congressional mandate. And where Congress has drawn a distinction, however nice, it is not proper for us to obliterate it. That seems to us to be the case here. Whether wisely or not, Congress confined § 166 to trusts where there was a 'power to revest.' The problem of interpretation under §166 is therefore quite different from that under § 22 (a). The former is narrowly confined to a special class; the latter by broad, sweeping language is all inclusive. . . Accordingly, the wide range for definition and specification under the latter is lacking under § 166. And so far as § 166 is concerned no apparent or lurking ambiguity requires or permits us to divine a broader purpose than that expressed. The legislative history corroborates this conclusion."

MR. JUSTICE ROBERTS concurred in the result.

The case was argued by Mr. Warner W. Gardner for the petitioner, and by Mr. Thomas P. Helmey for the respondent in No. 383; by Mr. George M. Wolfson for the petitioner and by Mr. Dean G. Acheson for the respondent in No. 384.

Limitation of Actions—State Statute of Limitations in Relation to Suit in Equity in Federal Courts.

The New York three-year statute of limitations is not available as a defense to a suit in equity in a federal court to enforce the liability of stockholders of a federal joint stock land bank for the bank's debts.

Russell v. Todd, 84 Adv. Op. 517, 60 Sup. Ct. Rep. 527. (No. 329, decided February 26, 1940.)

In this case a question was presented as to whether the state three-year statute of limitations is a valid defense to a suit brought in a federal district court in New York to enforce the statutory liability of shareholders of a joint stock land bank for its debts.

It was conceded that the cause of action accrued and the plaintiffs had notice of its accrual about three years and eight months prior to the date of the commencement of the action. The defendant shareholders in an action to enforce liability against them under § 16 of the Federal Farm Loan Act pleaded the New York three-year statute of limitations. The District Court overruled the plea and gave judgment for the respondents which the Circuit Court of Appeals affirmed. On certiorari the judgment was affirmed by the Supreme Court in an opinion by MR. JUSTICE STONE.

In disposing of the case MR. JUSTICE STONE calls attention to the fact that the sole remedy for enforcement of the liability is by plenary suit in equity and that the decisive question is what lapse of time will bar recovery in the absence of an applicable federal statute of limitations. It is noted that the Rules of Decisions Act does not apply to suits in equity and that the courts of equity, in the absence of any statute of limitations made applicable to equity suits, provide their own rule of limitations through the doctrine of laches.

The opinion recognizes further that the federal courts have followed the rule that equity will withhold its remedy where the suit is brought in aid of a legal right, if the legal right is barred by the local statute of limitations. Here, however, the jurisdiction of equity is exclusive and is not exercised in aid of a legal right. Consequently the state statute of limitations on actions at law is inapplicable on that theory.

Finally, consideration is given to the question whether the state courts would apply the three-year limitation to the present action. This led to an examination of the rulings on this subject in New York. The precise question does not appear to have been decided by the New York Court of Appeals. But a ruling of the Appellate Division and the reasoning of the Court of Appeals on which the decision rests are accepted as persuasive that the three-year statute would not be applied to a suit like the one at bar, where the remedy is exclusively equitable and not in aid of a legal right. In this connection *Mencher v. Richards,* 256 App. Div. 280, is cited. Stating the Court's conclusion on this point, MR. JUSTICE STONE says:

"In the absence of a definitive ruling by the highest court of the state, we accept the decision of the Appellate Division and the reasoning of the Court of Appeals upon which it rests as persuasive that the three-year statute does not apply to suits like the present where the remedy is exclusively equitable. . . .

"We take it that in the absence of a controlling act of Congress federal courts of equity, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act, adopt and apply local statutes of limitations which are applied to like causes of action by the state courts. . . . In thus giving effect to state statutes of limitations as a substitute or supplement for the equitable doctrine of laches, it must appear with reasonable certainty that there is a state statute applicable to like causes of action. As that does not appear here with respect to the three-year statute, the court below rightly declined to give effect to that statute and as it found that the cause of action

was not barred by laches, it rightly gave judgment for respondents."

MR. JUSTICE ROBERTS voted for the reversal for the reasons stated in the dissenting opinion of Clark, J., in the Circuit Court of Appeals.

MR. JUSTICE MURPHY took no part in the decision of the case.

The case was argued by Mr. Ralph M. Carson for the petitioners, and by Mr. George A. Spiegelberg for the respondents.

Summaries

Bankruptcy—Appellate Procedure Under Chapter X of Chandler Act—Appeals from Orders Allowing or Disallowing Fees.

The Dickinson Industrial Site, Inc. v. Cowan, 84 Adv. Op. 549; — Sup. Ct. Rep. — (No. 386, decided March 11, 1940).

Certiorari to determine whether an appeal from an order allowing compensation in a bankruptcy reorganization case under Chapter X of the Chandler Act may be taken as of right or only upon the allowance of leave to appeal in the discretion of the Circuit Court of Appeals.

A plan of reorganization of the petitioner under Sec. 77B of the Bankruptcy Act was confirmed in February, 1938, and thereafter respondents, members of the Bondholders' Committee, sought an allowance in the proceedings. The District Court awarded $2,000 for services rendered, though $20,000 had been asked. Respondents petitioned the Circuit Court of Appeals for leave to appeal which was allowed. In the Court of Appeals, the petitioner moved to dismiss the appeal on the ground that that court had no jurisdiction to allow it and contended that the respondent had an appeal as of right which could be taken only by filing notice of appeal in the District Court.

On certiorari, the order of the Court of Appeals was affirmed by the Supreme Court in an opinion by MR. JUSTICE DOUGLAS.

The opinion considers whether the Chandler Act is applicable to the appeal and the conclusion is reached that it is.

An analysis is made also of the applicable statutory provisions, being Sec. 24 and Sec. 250 of the Chandler Act, and the view is taken that appeals from all orders making or refusing allowances of compensation or reimbursement under that Act may be had only in the discretion of the Circuit Court of Appeals.

The case was argued by Mr. Benjamin Wham and Mr. Walter A. Wade for petitioner, and by Mr. Julian H. Levi for respondents.

Criminal Law—Appeal to Circuit Court of Appeals—Grand Jury—Subpoena Duces Tecum

Cobbledick et al v. United States. 84 Adv. Op. 524, 60 Sup. Ct. Rep. 540. (Nos. 571; 572; 573, decided February 26, 1940.)

Certiorari to determine "whether an order denying a motion to quash a subpoena *duces tecum* directing a witness to appear before a grand jury is included within those 'final decisions' in the district court which alone the circuit courts of appeal are authorized to review by § 128 (a) of the judicial Code (28 U.S.C. § 225)."

The Court's opinion by MR. JUSTICE FRANKFURTER answers the question in the negative. It restates the policy underlying the requirement of finality as a condition of federal appellate review and the necessity that the orderly processes of a case be not interrupted to consider incidentally questions which happen to cross the path of the litigation. Applying these principles to the case at issue, the opinion concludes that the situation of a witness summoned to produce documents before a grand jury is not so different as to remove the case from the general rule that to obtain review the witness must first have been found guilty of contempt, after which review is available.

MR. JUSTICE MURPHY did not participate.

The case was argued on January 30, 1940, by Mr. Donald R. Richberg for the petitioners and by Mr. Wendell Berge for the respondent.

Federal Income Taxes—Venue for Review of Board of Tax Appeals Decision—Limitations

Germantown Trust Co. v. Commissioner of Internal Revenue. 84 Adv. Op. 514, 60 Sup. Ct. Rep. 566. No. 462, decided February 26, 1940.)

Certiorari to determine the venue of proceedings to review a decision of the Board of Tax appeals and the applicable statute of limitations in a case where an investment trust company had filed a fiduciary return of income paid to participants from the invested principal, and they in turn had included their respective shares on their individual returns, but where the Treasury, acting on the theory that the fund should be taxed as a corporation, had prepared a substitute corporation return and given notice of a consequent deficiency of tax. The circuit court of appeals had held that the venue provisions of § 1002(a) of the Revenue Act of 1926 as amended, which provide for review by the circuit court of appeals for the circuit in which is located the collector's office to which the return was made, or, if "no return" was made, then, by the court of appeals of the District of Columbia, fixed the venue as if a return had been made but that, on the question of limitations, the provisions of § 275(c), fixing a four year limitation in cases where a corporation makes "no return" but each share holder includes his distributive share in his return, were applicable, and not the two year general limitation for cases where a return has been filed.

The Supreme Court's opinion, by MR. JUSTICE ROBERTS, agrees that the return in question fixed the venue as if a return had been made, but it finds error in the holding that there was "no return" for purposes of determining the applicable limitations. This holding is based on the theory that there is not sufficient reason to attribute a different meaning to the language dealing with "no return" in the venue section from similar language in the limitations sections, and that the statutory scheme and the legislative history demonstrate that the limitations sections fixed by § 275 are inapplicable to this case.

The case was argued on February 8, 1940, by Mr. Harold Evans for petitioner and by Mr. J. Louis Monarch for respondent.

Federal Procedure—Preliminary Injunctions—Necessity for Findings—Dismissal of Actions—State Statutes

Mayo v. Lakeland Highlands Canning Co., Inc., 84 Adv. Op. 481, 60 Sup. Ct. Rep. 517. (No. 270, decided February 26, 1940.)

Appeal from a decree of a three judge district court which granted a temporary injunction to restrain the Florida Commissioner of Agriculture from cancelling licenses of citrus fruit dealers; from enforcing regula-

tions made pursuant to the Florida Growers' Cost Guarantee Act; and from interfering with the conduct of business because of failure to comply with that act. The challenged statute authorized the Commissioner, under certain prescribed conditions and procedure, to regulate prices of citrus fruit and to cancel licenses of dealers not complying with his orders. The act was challenged on constitutional grounds, and the commissioners' action under the statute was said not to be in accord with the statutory requirements. The preliminary injunction was granted before answer.

The Court's opinion by MR. JUSTICE ROBERTS holds that the district court committed "serious error" in dealing with the motion for a preliminary injunction. It points out that the sole question before the Court was whether the showing made raised serious questions under the Federal Constitution and the state law, and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damage. It concludes that the observations made in the opinion of the district court that "we find the act unconstitutional" etc., are not findings of fact on these issues, and that findings of fact which fairly comply with Rule 52(a) of the FRCP are essential to a proper review.

The opinion further observes, as to contentions that the bill fails to state facts sufficient to raise a substantial question on the constitutionality of the statute, that the question was not raised in the district court by motion to dismiss, as it might have been, and that, since substantial constitutional questions are alleged in the bill, as well as questions of administrative compliance with the requirements of the Act, the record does not warrant dismissal by the Supreme Court, but requires instead that the decree be reversed and the case remanded with instructions that, if the motion for interlocutory injunction is pressed, the parties, if they wish it, be given further hearing, and that any action taken by the Court be upon findings of fact and conclusions on evidence in accordance with Rule 52(a) of the Rules of Civil Procedure.

MR. JUSTICE FRANKFURTER delivered a dissenting opinion in which MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS joined, expressing the view that the Florida statute is obviously constitutional and the action should, therefore, be immediately dismissed for want of a substantial federal question, except as it might present questions cognizable under the diversity of citizenship jurisdiction of the district court, relating to the failure of the state officers to comply with the statutory procedural requirements, and that as to these questions, the judgment should be vacated and the case remanded for any proceedings that may be appropriate before a single judge.

MR. JUSTICE MURPHY did not participate.

The case was argued on January 12, 1940, by Mr. William C. Pierce and Mr. O. K. Reaves for appellants and by Mr. G. L. Reeves for appellees.

Longshoremen's and Harbor Workers' Compensation Act—Member of a Crew Defined—Conclusiveness of Commissioner's Findings

South Chicago Coal & Dock Co. v. Bassett. (84 Adv. Op. 488, 60 Sup. Ct. Rep. 544. (No. 262, decided February 26, 1940.)

Certiorari to review a judgment of a circuit court of appeals which, reversing a judgment of the district court after a trial de novo, had vacated an award by a deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act, to a widow of an employee drowned while serving his employer on a vessel in navigable waters of the United States. The evidence in the district court had been similar to that heard by the deputy commissioner, and that court held that the employee was "a member of a crew" within the meaning of § 3 of the Act excluding those persons from the compensation which it authorizes the commissioner to award.

The Supreme Court's opinion by MR. CHIEF JUSTICE HUGHES concludes that the finding of the commissioner that the employee was not "a member of a crew of any vessel" and that the act was, therefore, applicable, turns on questions of fact which Congress has authorized the commissioner to determine; that his finding, if there is evidence to support it, is conclusive, and that it is the duty of the district court to ascertain whether it is so supported and if so, to give it effect without attempting a retrial. The opinion then reviews the facts and various definitions of the word "crew" in the light of the legislative history of the act, and concludes that even if the evidence permitted conflicting inferences, there was enough to sustain the deputy commissioner's ruling.

MR. JUSTICE MURPHY did not participate.

The case was argued on January 11, 1940, by Mr. Robert J. Folonie for petitioners and by Mr. Assistant Attorney General Shea for respondent.

Private Legislative Acts—Allowance of Review of Compensation Case by Private Act After Expiration of Time to Review Award Under General Act—Validity Under Due Process Clause.

Paramino Lumber Co. v. Marshall, 84 Adv. Op. 545; — Sup. Ct. Rep. — (No. 271, decided March 11, 1940.)

Appeal to determine the validity of a private act of Congress directing review of an order for compensation under the Longshoremen's and Harbor Workers' Compensation Act after there had been a final award by the deputy commissioner and after the expiration of the time for review.

The appellee, Clark, was injured while working as a longshoreman subject to the Act. On proceedings before the Commission, compensation was awarded him which the appellants paid. No proceedings were brought to review this award and it became final. Almost five years later Congress passed a private act directing review of the case and the issuance of a new order. This act was passed upon testimony before the House and Senate Committees on Claims to the effect that the case had been closed by the Commission upon the assumption that Clark had recovered, though it later turned out that further medical and surgical treatments were necessary. The appellants challenged the constitutional validity of the private act under the due process clause of the Fifth Amendment and sought to enjoin its enforcement. A specially constituted court of three judges was called which sustained the validity of the act. On direct appeal, the ruling of that court was affirmed by the Supreme Court in an opinion by MR. JUSTICE REED.

The opinion emphasizes that the act does not set aside any judgment, or create a new right of action, or direct the entry of any award. Furthermore, it is stressed that the hearing provided for under the private act is subject to the provisions of the general act, and that the law does not create new obligations where none existed before. A further consideration noted is that

(*Continued on page* 338)

INTERNATIONAL LAW SECTION TO HOLD SPRING MEETING

Plans for an Inter-American Bar Association—Attention of Students of Law Called to Treaties as Part of Domestic Law—Conference on Pan-American Commercial Law

Pursuant to resolutions adopted at the January meeting of the House of Delegates the Section of International and Comparative Law is arranging an unusual program for its annual spring meeting, to be held at the Mayflower Hotel, Washington, D. C., on Wednesday, May 15, 1940 at 12:30 p. m. The meeting will be a joint session with the members of the Eighth American Scientific Congress, the Federal Bar Association, the American Society of International Law, and the American Law Institute attending this important function. It will be recalled that at the midwinter meeting of the House of Delegates the following resolution was adopted:

"WHEREAS, The American Bar Association adopted at its annual session in 1937 a resolution in favor of cooperation with other national bar associations in the Americas with a view to promoting uniformity of law in the western hemisphere;

"WHEREAS, Such cooperation would be greatly facilitated by the establishment of a central organization in which all the national bar associations in the Americas were represented:

"*Resolved*, That the American Bar Association with due regard to the membership of the American Bar Association in the International Union of Advocates favors the establishment of an Inter-American Bar Association, authorizes the Section of International and Comparative Law to explore fully the possibility of establishing such an association, and directs the said Section to submit a report on the subject and recommendations as to future steps which should be taken for the realization of this project."

Inter-American Bar Relations

For the information of those who are not familiar with the historical background of this resolution, reference is made to reports submitted by the special committee on International Bar Relations, under the chairmanship of Dean John H. Wigmore, published in the annual volumes for 1933 and 1934. At the annual meeting at Boston in 1936 the Association became a member of the International Union of Advocates and Association delegates have participated in its subsequent meetings. At the annual meeting of the Association at Kansas City in 1937 a resolution was adopted favoring cooperation with the bar associations of other Pan American

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(*Continued from page* 337)

the purpose of the act was to cure a defect in administration developed in the handling of a compensable claim. In these circumstances no violation of due process was found.

MR. JUSTICE MCREYNOLDS dissented.

MR. JUSTICE MURPHY did not participate in the decision of the case.

The case was argued by Mr. Stanley B. Long for the appellants, and by Mr. Oscar A. Zabel for Mr. Clark.

State Statutes—Due Process—Equal Protection—"Psychopathic Personalities" Procedure

Minnesota ex rel Pearson v. Probate Court of Ramsey County. 84 Adv. Op. 477, 60 Sup. Ct. Rep. 523. (No. 394, decided February 26, 1940.)

Appeal from the Supreme Court of Minnesota in proceedings by writ of prohibition to prevent the state probate court from enforcing a state law dealing with "psychopathic personalities," on the ground that the statute violated the due process and equal protection clauses of the Fourteenth Amendment. The statute defined a "psychopathic personality" as meaning:

> "the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons."

Construing this section, the state court had said that it included "those persons who, by a habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire." The statute also provided that, with exceptions, the state laws relating to insane persons should apply to persons thus defined and it prescribed details of procedure.

The Supreme Court, in an opinion by MR. CHIEF JUSTICE HUGHES held that the statute does not violate the Federal constitution on the grounds raised; that the definition of the class of persons to which it relates, as construed by the state court, destroys the contention that it is too vague and indefinite to constitute valid legislation; that the contention of denial of equal protection of the laws, proceeding on the view that the group selected is part of a larger class, is also unavailing, since irrespective of that fact, the class selected is identified by the state court in terms which clearly show that the persons within that class constitute a dangerous element which the legislature is free to put under appropriate control; and that, apart from definition and classification, the procedure authorized by the statute on its face adequately safeguards the fundamental rights embraced in the conception of procedural due process, and it cannot be assumed that these procedural provisions will be so construed as to deprive the persons affected by them of their constitutional rights.

The case was argued on February 6th and 7th, 1940, by Mr. Joseph W. Cowern for appellant and by Mr. Chester S. Wilson and Mr. Kent C. Van den Berg for the appellees.

countries with a view to promoting uniformity of law in the western hemisphere.

The Eighth American Scientific Congress will meet in Washington from May 10 to 18 and Section IX of its program will be concerned with "International Law, Public Law, and Jurisprudence," under the chairmanship of Dr. James Brown Scott, who is also chairman of the Committee of this Section on Development of International Law through International Conferences. Officers or representatives of national bar associations in the twenty-one Pan American countries will be present at the meeting of the Scientific Congress and an unusual opportunity is therefore provided for discussing plans for the creation of an Inter-American Bar Association and possibly the signing of a constitution for such an organization by the President of this Association with the representatives of these other bar associations. The official brochure published with regard to the Congress contains the statement that ". . . it is hoped that the Section will take definite steps toward the realization of a project which has aroused increasing interest in recent years, namely, the organization of an Inter-American Bar Association." A proposed constitution is being drafted by a group headed by Colonel William C. Rigby, chairman of the Committee on Latin American Law, assisted by Dean Wigmore, Dr. Scott, George A. Finch, Dr. Leo S. Rowe, and others. If the delegates reach an agreement on the text of the proposed constitution it is expected that they will affix their signatures to it during the meeting on May 15, 1940. The signature of this document will be subject to ratification by the respective national bar associations at subsequent sessions and it is anticipated that in the case of our Association its ratification will be considered at the annual meeting at Philadelphia next September.

Treaties as Part of the Law of the Land

As a considerable number of teachers of international or comparative law will be assembled in Washington on this occasion arrangements are being made to have an outstanding teacher in this field discuss the means by which international and comparative law may be further emphasized in the present curriculum of law schools. This discussion is in furtherance of the resolution adopted at the midwinter meeting of the House and sent to the deans of all approved law schools, reading as follows:

"WHEREAS, International treaties and customary laws are part of the domestic law of the United States, as declared by the Constitution in Article VI, paragraph 2, as to Treaties and repeatedly by the Supreme Court as to customary International Law:

"WHEREAS, The Courts from time to time fail to give full consideration to international legal obligations, largely because the bar overlooks them, with the result that the basis is created for the presentation of international diplomatic claims:

"*Resolved*, That the American Bar Association considers it most desirable for law schools to take practical measures to bring to the attention of all law students the fact that international treaties and customary laws are part of the domestic law of the United States, which state and federal courts are obligated to apply in cases involving international justiciable questions."

Another subject that will be discussed at the spring meeting will be measures for the adoption of uniform commercial laws throughout the Americas. Arrangements are being made to have this subject discussed by an outstanding member of the Pan American Bar. The presence of lawyers from our neighbors to the South who have shown great interest in this subject will make possible a program carrying out the following resolution adopted by the House at its midwinter meeting:

Harris & Ewing

DR. JAMES BROWN SCOTT

Uniformity of Commercial Law Desirable

"WHEREAS, It would be of great service in the development of satisfactory commercial relations among the American Republics if a uniform system of law for such relations could be adopted throughout the Americas:

"*Resolved*, That the American Bar Association recommends that a detailed study be made of the problems of international commercial law in the Americas with a view to the formulation of an adequate code which may be submitted in the form of a convention for consideration by the Ninth Conference of American States to be held in Bogota, Colombia, in 1943."

This resolution has been acclaimed in the press, by serious students of Pan American relations, and by Government officials interested in improving commercial relations in the western hemisphere. For example, Under Secretary of Commerce Edward J. Noble, in a letter dated February 8, 1940 to Secretary Knight of this Association, commended this enterprise in the following words:

"I am delighted to learn that the House of Delegates is recommending this undertaking. The present condition of world affairs has focused our attention on the political importance of sound commercial relations between the United States and its neighbors to the north and to the south. The commercial law prevailing in the

(*Continued on page* 375)

THE LAWYER AND THE REAL ESTATE BROKER*

Protection of Public is Basis of Bar's Position—Conditions Under which Form Leases and other Legal Instruments May Be Used—Cooperation with Real Estate Boards Desired—Bar Association Committee Anxious to Avoid Litigation with Other Bodies

THE House of Delegates, at its mid-winter meeting in Chicago, January, 1940, by appropriate resolution, has approved of the policy of this Committee of endeavoring, through full discussion of unauthorized practice problems, to secure wherever possible cooperation of national associations of laymen in the acceptance of principles relating thereto.

In accordance with this policy, this committee, for some time past, has been attempting, together with a committee representing the National Association of Real Estate Boards, to arrive at a declaration of principles which would establish in the public interest cooperation and better service by both real estate brokers and lawyers and would protect the public from injurious results of unauthorized practice of law in this field. The Committee recognizes that the National Association of Real Estate Boards is an important national organization and is performing much useful work in the advancement of legitimate real estate interests throughout the country. The Committee maintains however that the public interest and protection are paramount to the selfish interests of either real estate brokers or lawyers.

Many Legal Problems Involved

Adequate and due protection to the public requires a full understanding that the conveyancing and leasing of real estate necessarily involves many legal problems. Before the parties to a real estate transaction are committed to an irrevocably binding contract, they are entitled to and should receive legal advice about such matters as a correct description of the premises, clarity as to the terms of payment, the type of deed and nature of title to be delivered and any and all exceptions thereto (including leases, mortgages, building restrictions, easements, zoning ordinances), proration of taxes, assessments, insurance and expenses, etc. Advice in respect thereto should be given by a lawyer whose sole interest is in the protection of the particular client for whom he is acting and whose compensation and interest are not solely that of closing the same.

These protections are lacking when, in order to bind the parties to contracts of purchase and sale, use is made of statutory, standard or other forms without the disinterested and competent legal advice of a practicing attorney which transactions involving real estate require.

Obviously, after the contract has been signed by the parties, many other matters remain which require legal services and without which neither party can be assured that the transaction is consummated in accordance with his contractual rights. Among these are the state and condition of the title of existing encumbrances and other questions substantially affecting the purchaser's rights and interests, and the sufficiency of the instrument so that the seller has conveyed what he agreed to sell and convey. Many other details should be inquired into and investigated to insure the correctness of the closing of the transactions.

Danger in Use of Forms

Basic and fundamental is the fact that whatever may be the rights of the parties with respect to the closing of the transaction, they are limited by law and bound by the original contract which they have signed. The anxiety of real estate brokers to effect such contracts is no justification for prejudicing the parties rights by the indiscriminate use of forms hastily drawn up.

For the purpose of protecting the public and assuring that legal advice shall be given by those fully competent to do so, the legislatures and the courts have long provided that only after years of training and an examination of their educational and character qualifications may lawyers be admitted to practice. As a further safeguard, statutes and court decisions in all states have required that only lawyers so qualified may practice law. Throughout the lawyer's practice, he is held by the court not only to the highest ethical standards, but in addition he is held civilly responsible for the advice given in accordance with the standard of an expert.

Despite what would appear to be a self-evident necessity for the protection of the public in respect to the above matters, the National Association of Real Estate Boards, as long ago as the summer of 1935, by unanimous vote of its board of directors, adopted a resolution advocating that

> "licensing statutes should be enacted to provide specifically that real estate brokers may prepare, incidental to their transactions, leases, deeds, sales contracts (both conditional and outright sales); earnest money receipts applications for loans; mortgages, commission agreements; notices to vacate; and that the brokers may appear in their own behalf or in behalf of clients before tax appeal bodies, zoning commissions and similar quasi-judicial bodies."

To the public announcement of the National Association of Real Estate Boards not only was this Committee forced to reply in 1936 but also this Association replied in 1937 by its President, then Mr. Stinchfield.

In two important test cases the principles advocated for the public good by the bar associations were sustained. (In re Gore, 58 Ohio App. 79, 15 N. E. 2d 968; Grand Rapids Bar Association v. Denkema, 290 Mich. 56, 278 N. W. 377.)

Nevertheless, the National Association of Real Estate Boards, through its various branches, has continued to insist that the following proposition in principle

*A statement of the Standing Committee on Unauthorized Practice of the Law of the American Bar Association in respect to unauthorized practice of law on the part of real estate brokers and realtors.

should be accepted by the bar: that real estate brokers should be allowed

"to make use of statutory, standard or other forms prepared by or approved by legal counsel for deeds, mortgages, bonds, notes, leases and other contracts and documents incidental to and concommitant with any real estate transaction which the realtor or those associated with him may undertake."

It is hoped that the acceptance by the bar of this proposal will not be a sine qua non to the consideration and adoption of a declaration of principles in respect to the many other matters where there might be most useful cooperation and full understanding between real estate brokers and lawyers throughout the country, for any acceptance of this proposal would be, in the opinion of the Committee, violative of the principles advocated for the public good by the bar associations. This statement is being issued so that there may be no misunderstanding as to our position.

Place of the Real Estate Broker

It is argued that real estate brokers should be permitted to do the things proposed in the interests of expediency, convenience and in order that they may close transactions themselves without delay or hindrance, and so that they may be assured of their compensation for having brought the parties together. None of these matters has anything to do with the interests of the parties who are going to be bound by the contract. The Committee is of the opinion that a broker is not "an interested party or a principal" in the transaction in any legal sense, but of course recognizes his natural desire to bring about the consummation of the transaction because upon this depends the success of his efforts and his right to compensation. But this should not be permitted to jeopardize the rights of the real parties.

The Committee believes that every legitimate protection should be given to the real estate broker who has earned a commission by bringing the parties together, but at the same time, reiterates its opinion that it is improper for a real estate broker:

1. To practice law or give legal advice, directly or indirectly.
2. To furnish legal advice or perform legal service, directly or indirectly, or to represent that he is competent or equipped to do so.
3. To select, adopt, adapt, draft, shape or otherwise prepare any instruments having to do with the consummation of any real estate transaction, whether or not the said broker was instrumental in bringing about the transaction.
4. To give advice or opinions as to the legal effect of any instrument involved in any real estate transaction or to prepare or give opinions concerning the validity of title to real estate.
5. In any way, to prevent or discourage any party to a real estate transaction receiving disinterested and qualified legal advice from any attorney duly authorized to practice law.

Approval of Standardized Forms of Leases

The Committee further recognizes that in many parts of the country, standardized forms of leases are being used for apartment houses, office buildings and dwellings and is of the opinion that where such forms have been prepared and approved by the bar associations as adequately protecting the public, their general use by real estate brokers might be permitted.

But the public should at all times be cautioned that in connection with any change or alteration made or required to be made in any such form, a real estate broker is not qualified nor authorized to give legal advice and it therefore recommends that all such forms of leases shall bear prominently displayed and in large type, the legend:

"This form has been approved by the ....Bar Association, and if any change is made in it, or required for your purpose, you are advised to consult your attorney."

While it is the function of the courts to finally determine what is unauthorized practice of the law in any jurisdiction, this Committee, believing that litigation does not promote good will, urges that joint action by bar associations and those representing the real estate brokers in their respective localities be taken along the lines of this statement in order that by such cooperation the public may be best served.

It is suggested, however, that in any jurisdictions where real estate brokers may rely upon statutory authority or court decision to permit them to practice law with relation to real estate contracts and similar transactions, that appropriate legislation in such jurisdictions be enacted to protect the public from such irresponsible legal advice. and require that the real estate broker be personally liable for any damage or loss suffered by either party to such transaction which arises out of the broker's neglect, incompetent or careless legal advice. Without such a statute the public may find itself remedyless. The dangers to the public are aptly pointed out in the opinion of the lower Court, In re Gore.

Failure to Reach Agreement on Principles

The American Bar Association and its Committee on Unauthorized Practice of the Law regret that up to this time the National Association of Real Estate Boards has been unwilling to accept the principles herein set forth, and the Committee hopes, in the interests of better service to the public, that at some future date an agreement may be arrived at in respect thereto.

In the meantime, this statement is issued for the benefit of all state and local bar associations that they may be advised of the present situation and in the expectation that it may be of some assistance to them in connection with the problems involved.

EDWIN M. OTTERBOURG, Chairman

Henry B. Brennan, John D. Randall, Paul H. Sanders, Fred B. H. Spellman.

Junior Bar Surveys Court Procedure

The survey of the administration of justice in the forty-eight states is now definitely under way with the distribution early in March of a manual and forms to aid the state committees in this work. Paul DeWitt, of Ann Arbor, Michigan, director of the survey, acknowledges the "constant advice and help" of Professor Blume of the Michigan Law School in planning the work and preparing the aids to the state committees. The manual consists of five pages outlining purpose and method of the project. A sample survey based on Michigan procedure is also presented in the manual. The forms are designed to elicit facts only and to exclude conclusions. Mr. DeWitt writes: "We do not want mere conclusions, but documental studies. That is, we want the committees to tell us the facts, and then let us draw the conclusions. Any other approach, it seems to me, would result simply in reports that could not in their very nature be tested by controls."

FEDERAL TRADE COMMISSION PROCEDURE*

Chairman Explains Method of Work—How a Complaint Is Handled—Rules of Evidence—Functions of Trial Examiners—Order to Cease and Desist

By Hon. Robert E. Freer
Chairman Federal Trade Commission

THE Federal Trade Commission administers several of the antitrust laws. The "grandfather" of the antitrust laws, the Sherman Act, was approved in 1890. . . .

Several different approaches to the problem of strengthening the antitrust laws were suggested. All felt that many business practices which contributed to the monopolistic situations condemned in the Sherman Act should be made illegal. There was some conflict over whether Congress should attempt to draw a statute enumerating specifically the business practices then considered unfair or whether an administrative agency should be created, and empowered to act under a broad standard of illegality. . . .

Duties Imposed Upon the Commission by Three Laws

The Commission derives its jurisdiction from three statutes, the Federal Trade Commission Act,[1] the Clayton Act[2] and the Export Trade Act.[3]

The principal basis of jurisdiction is contained in Section 5 of the Federal Trade Commission Act, which declares unfair methods of competition and unfair or deceptive acts or practices in commerce unlawful. When the Commission has reason to believe that any person, partnership or corporation has been or is engaged in unfair acts, practices or methods of competition in commerce, it is directed to issue and serve a formal complaint setting out wherein it believes the law to have been violated, if such a proceeding appears to the Commission to be in the interest of the public. Thus is initiated a proceeding which may culminate in an order directing the respondent to cease and desist from the practices considered unlawful. . . .

Investigation Prior to Formal Action

Mr. Justice Douglas is credited with saying recently, in connection with cases coming to the Supreme Court, that he felt just like an oyster, getting only what the tide brought in.[4] This apt simile applies generally to the courts, particularly in the field of competitive practices. Courts may deal only with such cases and controversies as are presented to them by parties competent to maintain an action. One of the purposes of Congress in creating the Federal Trade Commission was to endow an agency in the field of trade regulation with a mobility not possessed by the courts, one that need not merely take what the tide brings in. As a consequence, the Commission is empowered to, and does, initiate investigations upon its own motion as well as upon information presented by competitors, consumers or others, including federal, state and municipal authorities. . . .

How a Case Proceeds

Perhaps I can give you the clearest idea of how the Commission functions by taking a purely hypothetical case and following it through from beginning to end. Let us suppose that the Commission receives a letter from a wholesaler of groceries stating that certain of his competitors have concertedly threatened manufacturers from whom he buys in interstate commerce, with the result that these manufacturers will no longer sell him goods. The office of the Chief Examiner looks into these allegations in a preliminary way, and, if they appear well-founded, makes a complete and thorough field investigation, which is reported fully to the Commission. We will assume that the Chief Examiner's report of this field investigation indicates the following to be true:

There are five wholesalers serving one trading area, all purchasing from numerous manufacturers in other States and reselling to retailers. Wholesaler A, who has complained to the Commission, has fallen into disfavor with the other four wholesalers because of his policies of reselling at a very small margin. These wholesalers enter into an understanding among themselves whereby each writes to the manufacturers supplying all five and threatens to withdraw his business unless such manufacturers refuse to sell to Wholesaler A, and the manufacturers do thereafter refuse to sell to A.

Action Upon a Complaint

If from these facts, the Commission decides that it has reason to believe that the wholesalers are engaged in an unfair method of competition in commerce, and that a proceeding would be in the interest of the public, it directs the preparation and service of a complaint against them charging violation of the law.[5]

In reaching its decision to issue complaint the Commission acts ex parte, and the applicant, through whom the subject matter of the proceeding may have come to the attention of the Commission, has no standing as a party at any stage. The Commission makes it a practice not to reveal the identity of applicants, and to proceed on the basis of the public interest rather than of any private grievances.

The complaint is prepared in accordance with the Commission's direction in the office of the Chief Counsel, usually by the attorney who will appear in support of the complaint at the trial of the case, and is served

*Excerpts from an address before the Washington Institute on Practice and Procedure before Administrative Tribunals of the American Bar Association, U. S. Chamber of Commerce Auditorium, Washington, D. C., November 16, 1939.

1. 38 Stat. 717; 52 Stat. 111.
2. 38 Stat. 730.
3. 40 Stat. 516. Two other Statutes, the Packers and Stockyards Act, 42 Stat. 159, and the Miller-Tydings Act, 26 Stat. 209, as amended by Pub. Law 314, 75th Congress limit this jurisdiction.
4. Washington Evening Star, August 20, 1939, p. 1.
5. In practice such a complaint would in all probability join the manufacturers as well, but to simplify the illustration they are omitted.

upon respondents, generally by registered mail. This complaint outlines all the facts, describes the parties fully and the nature of their business, and states wherein the Commission believes the facts to constitute a violation of the law.

The respondents may appear for themselves, either through a bona fide officer with proper authorization if they are corporations, by a partner if they are partnerships, or they may appear by attorney. Any attorney in good standing admitted to practice before the Supreme Court of the United States or the highest court of any State or territory of the United States or of the District of Columbia may represent them before the Commission.[6] . . .

Assume in our hypothetical case that the four respondents admit all the allegations of the complaint except the one charging their action to be pursuant to agreement or understanding, and deny that their acts constitute an unfair method of competition.

Hearings Held

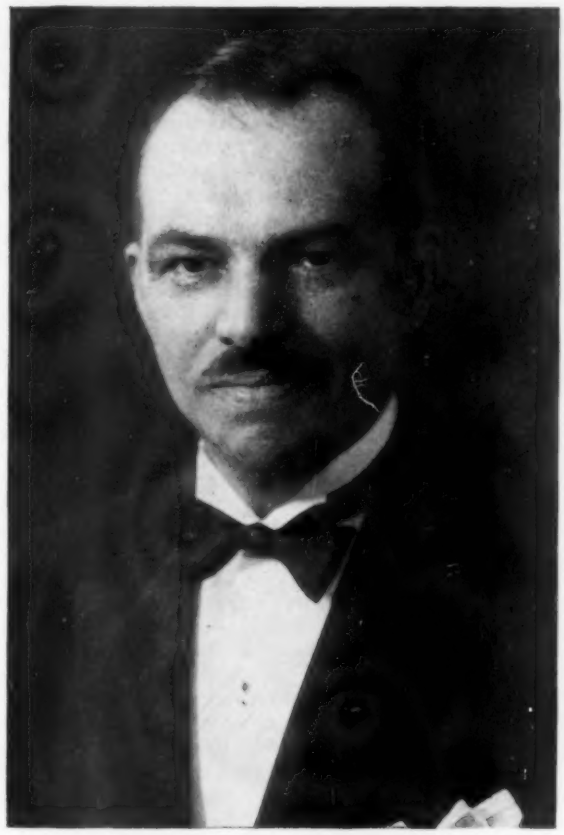
A trial examiner is designated by the Commission to preside over the hearings. The trial examiner is designated from among those members of the Commission's Trial Examiners Division who have no connection whatever with any other feature of the Commission's work than the exercise of such quasi-judicial duties. Witnesses are called first by the Commission's Trial Attorney in support of the allegation that the respondents acted pursuant to agreement or understanding.

The trial examiner is given full authority to rule upon the admissibility of evidence in a hearing, and provision is made for appeals from such rulings to the Commission. The Commission may, if it deems it advisable, postpone argument on such appeals to final argument upon the merits, or it may hear the appeals specially during the course of the trial of the case.

In hearings before trial examiners the Commission requires adherence as closely as possible to the rules of evidence as established by equity courts. Thus, incompetent or irrelevant evidence, offered either by the Commission's attorneys or those of the respondent, is excluded by trial examiners. However, no adherence is made to the strict letter of the rules of evidence when the result is to defeat substantial justice.[7] The courts have upheld the Commission's right to receive evidence or testimony which "is of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs," although perhaps technically incompetent.[8]

Admission of Evidence

May I emphasize, however, that the Commission very rarely permits any departure from the fundamental principles governing the admission of evidence in equity proceedings, and it must be satisfied that there is sound reason for such departure and that no element of fairness will be thereby impaired or disregarded.



HON. ROBERT E. FREER
Chairman, Federal Trade Commission

At the conclusion of the hearing, the trial examiner is empowered to request, either on his own motion or that of counsel, a statement in writing from attorneys for the Commission and attorneys for the respondents, setting forth the contentions of each as to the facts proved in the proceeding. The trial examiner is required within fifteen days of receipt of the complete stenographic transcript of the testimony to file with the Commission a report upon the evidence. Copies of this report are served upon each attorney for the respondents and upon the Commission's attorney. The report contains a statement of the allegations of the complaint, the contents of the answer, and a summary of the evidence adduced at the hearing, with citations to the record.

Within ten days after receipt of the trial examiner's report, counsel may file exceptions thereto. These exceptions should specify the particular part or parts of the report to which they relate, and may suggest any additional facts which the exceptor feels should have been included.

The report of the trial examiner is not considered as a part of the formal record and is not a decision or finding of the Commission in any sense of the word. . . .

(*Continued on page 370*)

6. No register of attorneys who may practice is maintained and it is not necessary for an attorney to apply for admission to practice. A written notice of appearance on behalf of a specific party or parties in a particular proceeding, containing a statement that the attorney is eligible, is all that is necessary.

7. In only one instance has the Commission attempted to enunciate any rule of evidence by which it will be bound. Rule XIX states that: "Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, such immaterial or irrelevant parts shall be excluded and shall be segregated insofar as practicable."

8. *Bone & Sons, Inc. v. F. T. C.*, 299 Fed. 468, where the court held that failure to exclude incompetent evidence was not ground for reversal, but suggested that the Commission must use a high degree of fairness in finding facts therefrom.

London Letter

General Council of the Bar—Annual Report

The Annual Statement of the General Council of the Bar for 1939, which has recently been issued, is much smaller than usual, due to the appeal which has been made by the Government to all citizens to economize as much as possible in the use of paper. For this reason also it was not circulated to all Members of the Bar, as in previous years, but was instead posted on all notice boards in the Inns of Court, and a small number of copies sent to the Libraries and Common Rooms of the four Inns for distribution to Members who had occasion to use those Libraries and Common Rooms. The statement refers to the list, compiled by the Council, of barristers who by reason of their age or disability are not likely to become eligible for service with the forces of the Crown, and who might therefore be recommended for appointment to other posts in which they could serve the country. It transpires that no fewer than seven hundred and fifty barristers of forty-one years of age or over, offered themselves for work of National Service.

The annual general meeting of the Bar was held in the Inner Temple Hall on the 18th January, 1940. The Attorney-General, Sir Donald Somervell, K.C., presided. In the course of his address he alluded to the arrangements made for carrying on the practices of those members of the Bar who were on active service.

The Chairman of the Council, Sir Herbert Cuncliffe, K.C., who moved the adoption of the annual statement, said that the general opinion seemed to be that the scheme was better than that of the last war. The criticism had been expressed that the protection ought to be limited to combatants; but the Council had come to the conclusion that many barristers in non-combatant war services were just as effectively prevented from attending to their practices as if they were in the fighting forces, and provision ought to be made for them.

Legal Etiquette

Among matters concerning professional conduct and practice settled by the Bar Council during the past year it is interesting to note a resolution which was passed for the guidance of Counsel in the matter of wearing uniform in Court. It was decided that, except in cases where the Barrister is serving with the armed forces of the Crown, and is required to wear his uniform while so serving during the war, a barrister should not appear in Court in uniform and should wear robes in the usual way. This ruling would seem to exclude the barrister Special Constable and members of the Bar who have joined the Auxiliary Fire Service from advertising the fact by this means.

Lawyers and the Right of Audience

A matter which is giving cause for much adverse comment by the legal profession in England at the present time concerns the right of audience (or the denial of the right of audience) before various tribunals which have been set up under the provisions of war legislation. It is realized that in time of war there must, of necessity, be some interference with the normal rights and freedom of the individual citizen but it is felt, in many quarters that the denial of the right to be represented by a member of the bar or a solicitor in a case which may have the most serious results for the person concerned is quite contrary to that spirit of justice for which we have been praised more than once by impartial observers. This matter was first ventilated in connection with the Aliens Tribunals, which were set up to review rapidly all cases of Germans and Austrians with a view to sifting out any who, though claiming to be refugees, might not in fact be friendly. The tribunals had a discretion to allow aliens to be accompanied by some friend or witness who could give information likely to assist the tribunal, but legal representatives were not permitted to appear. The reason given by Sir John Anderson (the Home Secretary) in reply to a question in the House of Commons was that

> "the whole procedure is new and is designed to avoid the necessity for any general measure of internment. It is desired to complete the review with the greatest possible expedition. This object would not be attained if every case had to be dealt with as though the alien were being tried in a court of law."

By many lawyers this reason is not regarded as a good one, and their opinion of it was pithily put by the *Law Journal* which stated,

> "We are at a loss to understand the reason for this attitude. If it be that the matters to be dealt with are mainly those of fact, the answer is that the lawyer's special skill is in the eliciting and marshalling of facts. If it be that those who cannot afford legal aid would be unjustly penalised, that is an accusation which is as true or as false in all cases when the doings of the subject are called in question, besides denying legal help to those who can afford to pay."

Another argument urged against the exclusion of the legal profession in these cases was the difficulty likely to be experienced by an alien, probably with a scanty knowledge of the English language and complete ignorance of the law, which, added to a natural nervousness and confusion, would make a personal statement of his case almost impossible.

Barristers and Solicitors Excluded

Another instance in which there is a denial of legal representation is to be found in that part of the National Service (Armed Forces) Miscellaneous Regulations, 1939, which deals with appearance before Military Service (Hardship) Committees. It is laid down that in cases before a Committee the Umpire or a local or Appellate Tribunal, the applicant may appear in person or may be represented by a representative of any trade union to which he belongs, or by any person who satisfies the committee, umpire, or appellate tribunal that he is a relative or personal friend of the party he proposes to represent. In cases before the committee or the umpire neither the applicant nor the minister may be represented by counsel or solicitor. In cases before the appellate tribunal, however, both the applicant and the minister may be represented by counsel or solicitor.

The latest regulations in which the right of audience is denied are the Prices of Goods (Price Regulation Committees) Regulations, 1939. The price regulation committees are set up in accordance with the provisions contained in the Prices of Goods Act, 1939, which has for its object the prevention of profiteering. The full penalty for offenses under the Act may ultimately result in a fine of £500, with or without imprisonment for two years. Yet

> "any person against whom an allegation of a contravention of the Act has been made shall appear before the Committee in person and not through a legal or other

professional representative, but he may bring with him such persons as he may reasonably require to assist him in dealing with such allegations."

Law Society Disturbed

At a meeting of the Law Society held on January 26th, 1940, a very serious view was taken of the matter and some time was sepnt in discussing it. To prohibit legal representation in a matter which might lead to the loss of personal liberty, it was said, was to withhold a right which had hitherto been enjoyed by every accused person, and was a gross infringement of the constitutional rights of the subject. The Law Society is in communication with the General Council of the Bar with a view to joint action by both branches of the legal profession in an endeavor to remedy this state of affairs.

Middle Temple Treasurer

Sir Cecil J. B. Hurst has been appointed Treasurer of the Middle Temple, in succession to the Hon. Mr. Justice Henn Collins. Sir Cecil Hurst was called to the Bar in 1893, and to the Bench of his Inn in 1922, four years after he had taken silk. He was assistant legal adviser to the Foreign Office from 1902 to 1918, and adviser from 1919 to 1929, in which year he became the British member of the Permanent Court of Arbitration at the Hague, and a Judge of the Permanent Court of International Justice, of which Court he was President from 1934 to 1936.

Gray's Inn is now the only one of the four Inns of Court whose pre-war Treasurer is still in office. (The Treasurer is the chief officer of an Inn).

Lord Tweedsmuir

It is customary in the Middle Temple for the Inn's flag to be flown at half-mast on the Hall and the Library when a Bencher of the Inn dies, and this was accordingly done on Monday 12th January, when news reached this country of the death of Lord Tweedsmuir, who was an honorary Master of the Bench of that Inn. He was admitted a student in 1897 and called to the bar on the 19th June, 1901, in which year he became private secretary to the High Commissioner for South Africa. From 1915 to 1917 he served on the headquarters staff of the British Army in France, and in 1917 became Director of Information, holding the rank of Lieut.-Colonel. He was elected an Honorary Bencher of the Middle Temple on the 9th May, 1935. Many Universities had conferred honorary degrees upon him —Oxford, Harvard, and Yale among others. Lord Tweedsmuir's writings, both as historian and master of fiction, have a world-wide reputation.

Master and Servant

An interesting and hard fought action, the first of its kind, has recently been concluded here. This was the case of *Pratt v. Cook, Son & Company (St. Pauls) Ltd.* in which the plaintiff relied upon the provisions of the Truck Act, 1 & 2 Will. IV, c.37. This Act was passed to put an end to the practice, then common, of employers paying the wages of their work people in goods, or otherwise than by coin of the realm (s.1), and it entitled the artificer to recover any part of his wages which had not been paid to him in current coin of the realm (s.4). The case was first heard before Wrottesley, J., in the King's Bench Division in February, 1938. The plaintiff, a packer, had been employed by the defendants, a firm of wholesale drapers, for a number of years, and the contract of employment provided that his wages were to be at the rate of 63s. a week, of which 53s. were to be in cash and the remaining 10s. to be in the form of dinners and teas prepared and served on defendant's premises. The plaintiff alleged that all of the payments made otherwise than in cash over the whole period of his employment were illegal, and he claimed to recover the sum £397:10:0, which was the agreed value of the meals he had had during his many years of service with the defendant company. The defendants contended that the plaintiff was not a manual worker and so was not entitled to the protection of the Truck Act, that he was not remunerated partly by current coin and partly by meals, that the provision of meals was a thing which the firm chose to do voluntarily, and that the terms agreed with the plaintiff's union formed, if it were needed, an agreement in writing which would make the deductions lawful. They also relied on s.23 of the Truck Act, which provides that

"nothing herein contained . . . shall prevent any employer of any artificer . . . from supplying or contracting to supply . . . to any such artificer any victuals dressed or prepared under the roof of any such employer, and there consumed by such artificer."

This section also provides that no deduction shall be made from the wages of the artificer in respect of such victuals, unless the agreement or contract for such deduction shall be in writing, and signed by such artificer. It was, however, held by the judge that the plaintiff was engaged in manual labor and was therefore entitled to the benefit of the Act; that he had been remunerated to the extent of 10s. weekly by the provision of dinner and tea; and that a written agreement *signed by the servant* is essential to the validity of any of the deductions mentioned in s.23. Judgment was accordingly given for the plaintiff.

Against this decision the defendant company appealed, and the appeal was heard by Lords Justices Slesser, Finlay and Goddard in November, 1938, when the judgment of Wrottesley, J., was reversed (Goddard, L. J., dissenting); it being held that the contract did not contravene the earlier sections of the Truck Act because of the proviso in s. 23 relating to the supply of victuals.

House of Lords Reverses Court of Appeal and Restores Judgment for Employee

Leave was given to appeal to the House of Lords and the last stage was reached on February 8th, 1940, when the case came before Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Romer. In giving judgment Lord Atkin pointed out that the express object of the Truck Act was to prevent the payment of wages in goods, and he was forced to the conclusion that s. 23 did not afford an easy passage through the early prohibitions, and that the supply of the goods and services specified in the section could not be made by way of wages. Lords Thankerton, Russell and Wright agreed; but Lord Romer supported the view of the majority in the Court of Appeal. The judgment of the Court of Appeal was accordingly reversed and that of Wrottesley, J., restored, with costs.

Retrospective Law Suggested

It is thought that this judgment may cause serious embarrassment to some firms who have for a long time adopted the method of payment which was the subject of contention and it has even been suggested that some form of legislation should be hurriedly passed which would regularize the procedure and be made retrospective.

S.

The Temple.

LEGAL ETHICS AND PROFESSIONAL DISCIPLINE

Persistent Dilatoriness and Inattention to Clients' Affairs Results in Disbarment

DILATORINESS and inattention are probably the grounds upon which well-founded complaints are most frequently made against lawyers. Yet it is seldom that the discipline that such professional misconduct merits is imposed. Consequently, it is worthy of note that the Supreme Court of Minnesota recently disbarred a lawyer on these grounds. The Court said:

"The misconduct established by the evidence in support of the original complaint was attempted to be condoned upon the ground that while respondent is, in the words of the referee, 'honest and conscientious, . . . he has been careless concerning correspondence.' The thought was that 'the extent of the [carelessness] here shown may be found more frequently in an office in a small town where practice does not permit the employment of stenographers and clerks common in offices in larger cities.' However that may be, it does not even tend to excuse the persistence of inattention presented by this case. There is no showing of illness or absence from office due to other cause which would justify respondent's professional non-feasance. The probability is that he had a small practice. All the more reason for giving every detail diligent attention. The small is built into the large practice only by diligent service of the few clients and by efficient handling of their small matters. The attorney who cannot be diligent in serving a few clients and in the dispatch of little matters certainly will be no more so in serving many clients and in the dispatch of important business. . .

"In agreement with the referee we too would be disposed to indulgence were it not for the cumulative and convincing effect of the utterly inexcusable neglect and incompetence in serving the client who retained him for the probate proceeding.

"An attorney's oath on admission puts him under the solemn obligation to delay no cause for lucre or malice. He is put under equally binding obligation faithfully to serve his clients to the best of his ability. That implies that he shall have an equipment of learning and ability that will enable him to serve clients as they reasonably expect to be served. Here there is a showing that makes unavoidable the conclusion that respondent, over a long period, has demonstrated an utter lack of needed capacity properly to serve clients. The deficiency may not be due to lack of learning. It is more likely attributable to a fixed and irremovable habit of dilatoriness. No other conclusion is possible, in view of respondent's repeated inattention to the fact that his misconduct had been so persistent and damaging as to be the subject of complaint to the ethics committee of the state bar association. After the matter became the subject matter of formal complaint here, he made no resort to dilatory or obstinate tactics (for contrasting conduct see *In re Disbarment of McDonald*, 204 Minn. 61, 282 N. W. 677, 284 N. W. 888). That is subject for deserved commendation, but not sufficient occasion for condonation."

A Lawyer and His Client Cannot Deal at Arm's Length

The Supreme Court of New York, Trial Term, recently emphasized the precaution that must be observed when an attorney purchases his client's property.

The client, by letter, had created a personal situation which would, said the court, "obviously, end their personal relations." To settle their financial differences, the client proposed, among other things, to sell one of his investments to his lawyer. The adjustment took the form of a payment of money by the lawyer and the execution of a conveyance of the investment in question, together with a general release, to the lawyer. At the closing of the agreement, no third person was present. The client repudiated the settlement and brought suit.

The Court said:

"The rigid rules that govern lawyers who buy from even unfriendly clients make it dangerous for the lawyer to conduct the transaction himself; the law requires him to lean backward in such a situation, and either to give the client every relevant fact and full warning of all his rights, or send him to other counsel, or otherwise completely present and discuss the disadvantages under which the layman is supposed to be in such a transaction. The complete disclosure of all the lawyer's supposed advantages, and a reminder of all the client's rights is to come from the lawyer, or from some neutral adviser of the client. If this had been done here the general release would have been a bar to this suit, but the trial disclosed a situation that required that release to go to the jury. These facts made the suit possible, because they gave the client the right to attack the general release from the angles mentioned. The defendant when he bought this property from one who had not yet become his ex-client, and obtained a general release as part of what he thought was a final settlement, acted as his own lawyer, and the client was not represented or properly advised. I have no doubt that as the lawyer intended and effected a fair settlement, but as he failed to observe those harsh rules that do not apply between laymen, his shortsightedness, however innocent, opened the door for this suit. Thus he has to blame himself for having to face the client who quite plausibly challenges the validity of the release."

Was the Discipline Too Light?

In an Oregon case, 98 P. (2d) 955 (Feb. 1940), it appeared that an attorney, who is a notary public and has practiced law thirty years, signed the names of his client and his client's brother, as principal and surety, respectively, upon an amended attachment bond, signed the name of his client upon the accompanying affidavit, and placed his own signature and notarial seal on the affidavit, indicating that he had administered the oath to his client. This followed the filing of a motion to set aside a writ of attachment that had issued for the reason that the undertaking that had been filed with the complaint was insufficient in amount. In the presence of the Court, the attorney falsely reaffirmed that the signatures of his client and his brother had been placed on the instruments by them in person and that he had administered the oath to his client. The Board of Governors found that the attorney had "committed a fraud upon and wilfully and wantonly attempted to and did deceive the court." It recommended suspension from practice for thirty days. The Supreme Court of Oregon thought this "not a sufficient punishment for the offense" and ordered suspension for six months.

Inasmuch as the purpose of a disciplinary proceeding is to determine whether the attorney is fit, as respects character, to practice law, it seems questionable whether such suspension was a proper order.

Service by Publication in Disbarment Cases

Governor Lehman recently signed a bill passed by the legislature of New York, providing for service by

publication in disbarment proceedings, where the attorney cannot be served personally. The bill is said to have been designed to cover such cases as that of Dixie Davis, whose disbarment was held up a long time because he was in hiding. The new law provides for personal service outside the state, but permits service by publication when personal service cannot be made. The lawyer is given a year's time to defend himself against the charges when service is by publication.

Cases similar to that of Dixie Davis not infrequently occur. Because courts have inherent power to impose discipline upon lawyers and prescribe procedure relating thereto, they should not hesitate to authorize service by publication when lawyers are charged with professional misconduct and evade service or flee the state.

Sending of an Improper Card Condemned

The Committee on Professional Ethics and Grievances was recently requested to express an opinion as to the propriety of an attorney's sending out the card below, which is said to be termed by an organization of practitioners of commercial law as a "standard information card."

Cleveland, Ohio

_____ _____ and _____ _____

General Attorneys and Counsellors at Law Listed in

Practice in all Courts — _____ Bldg. Cleveland, Ohio — C.R.C. International

Telephone _____

_____ _____

A Thoroughly Equipped Commercial Department
Every Debtor is Contacted Personally
PROMPT REMITTANCES PROMPT REPORTS
Member of [*above-named organization*]

The Committee advised the inquirer that it had often condemned the use of similar cards. It avails itself of this means of advising the Bar that the use of such a card is ethically improper.

Lawyer Groups in Dispute Over Use of "Bar Association" in Names

Litigation between lawyer organizations is something new. The Appellate Division of the Supreme Court of New York held good upon demurrer recently a complaint of the Brooklyn Bar Association against the Kings County Bar Association based on the use by the latter of the words "Bar Association." The trial of the case on its merits will be held in the near future.

Although the Appellate Court did not write an opinion, it held, in effect, that bar organizations are quasi-public bodies and subject to stricter supervision in the use of names than are business concerns.

The Brooklyn Bar Association was organized in 1889 and the Kings County Lawyers Association in 1911. The two organizations cover the same geographical area and contrived to live together without undue difficulty until last year when the Kings County organization decided to call itself a bar association instead of a lawyers' association.

The Brooklyn Bar Association claims that the public has constantly confused the two organizations since this action was taken. The complaint stated that statements issued by the Kings County Association on public questions, often at variance with the positions taken by the Brooklyn Association, were attributed by the public to the Brooklyn Bar Association. Also, it was claimed that the similarity in the names had injured the Brooklyn Bar Association's financial standing.

In its application to dismiss the complaint as insufficient in law, the defendant claimed the names were totally dissimilar. To back this contention, it set forth parallel lists, compiled from the New York telephone directory, of concerns whose names were identical except for the distinguishing use of "Brooklyn" by one group and of "Kings County" by the other. The application also asserted that no damages were shown in the complaint.

In answer to the first argument, plaintiff urged that bar associations and business houses must be treated differently. "The public looks to the former for its expression of views on constitutional questions, matters of legislation, the conduct of the courts and the qualifications of judicial candidates," the plaintiff maintained.

The Neighborhood Law Office Under Observation of "Blue Ribbon Jury"

There has been much discussion recently of the so-called "neighborhood law office," designed to meet the need of that section of the public that needs legal service but cannot pay the prices ordinarily charged and yet is not eligible to receive the free legal service offered by legal aid organizations.

The Philadelphia chapter of the National Lawyers Guild has established and has in operation about eleven such offices. A "Blue Ribbon Jury," which has been selected from among non-members of the Guild, is to observe its operation and appraise its worth. A meeting was recently held of the Neighborhood Law Office Committee of the Guild and the Jury, for the purpose of acquainting the Jury with the work of the Committee and the operation of the plan to date.

It was pointed out that no machinery has been set up by the Guild to guide the Jury in its deliberations, but that all meetings, investigations, collection of statistics, or drafting of reports, are left entirely to the discretion of the Jury. The Committee recommended that the observations cover a period of at least one year. At the expiration of that time, the Jury is requested to suggest any changes that might be desirable, and to issue a strictly impartial report to the public as to the merits of the plan.

The Jury is to be informed through Leon S. Forman, a fellow of the University of Pennsylvania Law School, who is acting as secretary and who has obtained extensive information on the plan. The Jury is asked to engage in any investigation work that it sees fit to do. Any expenses incurred by it will be borne by the individual law office partners through a special assessment.

The ultimate report of the "Blue Ribbon Jury" is intended to compare the neighborhood law office plan with other plans which have been proposed by various groups throughout the nation. Some of these are: (1) A bar reference bureau in which prospective clients would be referred to a file containing names of attorneys listed according to the type of work they are best qualified to handle. A private subsidy is needed for successful operation of this plan. (2) A legal service bureau in which clients would be advised by a paid staff of attorneys. A heavy endowment is also needed for this plan. (3) A proposal that the United States Department of Justice set up offices throughout the Nation for free legal advice and representation.

A short organization meeting followed the luncheon.

(*Continued on page* 352)

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

THE *Right of Property*, by Fr. Vinding Kruse, Professor of law in the University of Copenhagen. Translated from the Danish by P. T. Federspiel. 1939. Oxford University Press. Pp. xxi, 495.

This volume is decidedly worth reading by any serious student of property law. In a liberal spirit and with a constant remembrance of social values, it deals with fundamentals seldom discussed in our legal literature. The purpose of the five-volume work of which it is a portion is stated by its author to be the presentation of "a general Theory of Law and Sociology." The book is not, however, like Dr. Timasheff's recently published *Introduction to the Sociology of Law*, a study of law as one aspect of human behavior in a general setting of "ethics," "power," and "culture." In the opinion of Professor Kruse the sociology of law is to be found in "that enormous material of practical human experience which is laid down in positive law, legal practice, and legal institutions of the present and the past"; it is synonymous with "the common guiding principles of the law and legal development of the civilized human communities" (p. vi; *cf.* 147-53). As for these, since "the most important legal and social problems in modern civilized communities are . . . essentially alike" (p. v), he bases his discussion on the law of the Scandinavian countries, introducing a moderate number of references to other legal systems (usually very acceptably, but it may be remarked that he completely misunderstands the rule against perpetuities—p. 356).

A Defect in Social Sciences

That contemporary social "sciences" are lamentably "incomplete" in their treatment of property rights (p. 6), lawyers will readily concede. Still, some will recall that it has been economists, political scientists, socialists, philosophers, and churchmen—and practically no lawyers—whose names for a century past have been prominent in the literature of the subject. Professor Kruse very justly remarks upon this neglect by lawyers of "the great fundamental idea: *the right of property*" (p. 6; *cf.* 147) which is the heart of all theories of social reform. They are only concerned with the short-range tendencies which they dislike in its development.

Protection of Social Interests in Property

Professor Kruse believes heartily in protecting social interests in property by drastic communal control of selfish individualism;—excepting, however, "the great new realms" of intellectual property, in which "experience from all countries proves that private property rights provide the only practicable system" (75). "The law forces . . . private owners, not to think socially in a good sense . . . but to *act* in such a way that consideration is given to other things than the demands of the moment, to the interest of the community and of future generations" (167). "Only the consistent hard order of law exercising compulsion on the individual short-sighted private owner can, from a social, hygienic and economic point of view, secure great and lasting results. Weakness and half-measures lead to a deterioration of all values" (226). He recognizes, indeed, the "gigantic perspective of human nature" disclosed in the property law, and concedes that a society would act without vision which should limit its protection of property by short-range estimates of human welfare (351). Nevertheless, the mutability of property rights is manifest (351-402), and interests of stability and security are often counterbalanced by other interests. "A house and its exterior"—he says—"cannot be left to the exclusive decision of the individual private owner" (233)! Perhaps Danish law sustains such views; for, in referring to the theoretical ownership of all land in Russia by the state (as in England by the Crown), he remarks that "the practical effects of this" up to 1929 were "not essentially different from that which . . . the Danish state claims and enforces with regard to all landed property" (41). Manifestly exaggerated, however, is his idea that "a communism of property" has been developing for centuries in "all kinds of common ownership that serve the community or the general public, but whose economy is independent of the State" (102). It is true that these "practical units" of legal life (the author denounces all sterile controversies about juristic "personality") control a very considerable part of agricultural and industrial production, of distribution, and of insurance and credit transactions. Hence, he discusses all of them together (58-74, 239-74). But the idea that they have prepared the way for communal control of property (59) seems fanciful. They have certainly not substituted for economic individualism "a social organization of operations" (239). Wide distribution of stock does not mean, in this country at least, diffused or socially-minded control. A stockholder is no more friendly than a landowner to sacrifices of either substance or control for the common good. Indeed, the divorce effected by negotiable shares between property and its control, with consequent emphasis upon purely impersonal profit, only increases resistance to such sacrifices.

Expropriation vs. Denial of Rights

"Even the most recent codes have not advanced one step towards solution of the fundamental problems of the right of property" (9). The author's approach to them is through the distinction (obscure in the famous codes, 8, 106-08) between the "contents" (105-18, 140-

(*Continued on page* 350)

NOTICE BY THE BOARD OF ELECTIONS

The following states will elect a State Delegate for a three-year term in 1940:

Arkansas	Louisiana	Ohio
Colorado	Maryland	Oregon
Delaware	Minnesota	Rhode Island
Georgia	Nevada	Utah
Idaho	New Hampshire	West Virginia
Indiana	New York	

The following states will elect a State Delegate to fill vacancies for a term to expire at the adjournment of the 1941 Annual Meeting:

New Mexico Territorial Group (Alaska, Canal Zone, Philippine Islands)
Wisconsin

The following states, in addition to electing a State Delegate for a three-year term, will also elect a State Delegate to fill a vacancy expiring with the adjournment of the 1940 Annual Meeting:

Arkansas	Delaware	West Virginia
Colorado	Rhode Island	

Any additional vacancies which may occur prior to February 15, 1940, will also be filled at the general election.

Nominating petitions for all State Delegates to be elected in 1940 must be filed with the Board of Elections not later than April 12, 1940. Forms for nominating petitions for the three-year term, and separate forms for nominating petitions to fill vacancies, may be secured from the headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago. Nominating petitions, in order to be timely, must actually be received at the headquarters of the Association before the close of business at 5:00 P. M. on April 12, 1940.

State Delegates elected to fill vacancies take office immediately upon the certification of their election. State Delegates elected for a three-year term take office at the adjournment of the 1940 Annual Meeting of the Association.

Attention is called to Section 5, Article V, of the Constitution, which provides:

"Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group)."

Unless the person signing the petition is actually a member of the American Bar Association in good standing, his signature will not be counted. A member who is in default in the payment of dues for six months is not a member in good standing.

Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers as they appear upon the petition.

Ballots will be mailed to the members in good standing accredited to the States, in which elections are to be held, within thirty days after the time for filing nominating petitions expires.

Nominating petitions will be published in the next succeeding issue of the AMERICAN BAR ASSOCIATION JOURNAL which goes to press after the receipt of the petition. Additional signatures received after a petition has been published will not be printed in the JOURNAL.

While there is no restriction on the maximum number of names which may be signed to a nominating petition, in the interest of conserving space in the JOURNAL the Board of Elections suggests that not more than fifty names be secured to a nominating petition.

EDWARD T. FAIRCHILD,
Chairman of the Board of Elections.

42) and the "objects" (119-23) of ownership, on which he bases his own definition of that conception (9-11). Ownership is "a definite set of powers": all of Book II is a brief statement of exceptions to the *normal* power of alienation. Similarly, Book III deals almost exclusively with "the power internally to . . . exploit" property—that is, liberties of user; with only incidental reference to powers to alienate and to use property as a basis of credit (with which last two powers the author deals in Volumes III and IV of his work). This arrangement of materials is particularly interesting to an American familiar with pre- and post-Hohfeldian literature.

Tangible Objects of Ownership

As regards the objects of ownership, both in codes and in uncodified systems, the general limitation of such objects to tangible things still persists. The general dominance of tangible things and visible phenomena both in Roman and early Germanic law still constrains our thinking. This narrow conception of "things" has necessarily hampered the expansion of our conception of the *right* of property. We see it in our Anglo-American doctrines of larceny, of bailment, throughout the field of the common law actions even where they are gone, in our inbred dependence upon possession (however liberalized as respects its two elements of control and *animus*) in all aspects of title and transfers thereof. Professor Kruse, with his constantly practical attitude, repudiates the limitation and, with considerable authority to support him, approves the tendency to include such interests as those in designs, gases and liquids, electric current, light phenomena, radio and sound waves (8, 75, 119, 23. One notes that Danish law has permitted prosecution for "theft" of gas or waters secretly diverted, p. 119; and *cf.* 144). On possession, also, he has an enlighteningly untraditional and acute chapter (407-40). Still another opinion of the author that gives great satisfaction to the reviewer (since it supports his own views) is that we must abandon the distinction between "real" and "obligatory" rights (rights *in rem* and *in personam*). This distinction is mingled, in other legal systems as in our own, with a procedural distinction relating to the degree or extent of *protection* accorded to real and obligatory rights respectively; the resulting confusion being further increased in *our* law by employment of the phrases *in rem* and *in personam* to designate this second distinction. All together, the classification becomes one which Professor Kruse considers "one of the most extraordinary chapters in the history of human error" (124-28, 130-32).

Intellectual and "Spiritual" Property

Perhaps the most noticeable characteristic of his book is the heavy emphasis placed upon intellectual property and what he calls "spiritual property," as the only types of which new forms can develop and are in fact rapidly developing throughout the world. Discussion of the former type of property is not particularly novel. Not so the discussion of "spiritual property." Professor Kruse regards this as an actual "new form of property right," "a new reality" (p. 101, 102, 129). Why not?—if industrial needs justify recognition of patent-rights as property why should not "spiritual" needs create other types of property? Temporarily, however, many will prefer to say that he merely reveals the necessity of protecting spiritual values associated with property. And we might also justifiably assert that in our law, as under other legal systems, this is being increasingly done. As he himself says, "the right of property is no longer . . . an exclusively economic factor" in social life; "it is also the legal safeguard of other sides of human nature"; "in large fields of human life the actual right of property in external objects satisfies also certain non-material needs and are even based thereon" (129). The law has here lagged because social thinking, generally, long neglected such values.

In our author's opinion liberal economists have accepted a wholly materialistic view. "In the modern world the social conflicts are purely a struggle for material goods. This is closely parallel with the fact that property in modern law is purely an economic right. . . The ideas of economists and legal thinkers as well as of those engaged in the social conflicts revolve equally and solely round the external tangible goods, the economic values" (p. 80). Much in our own law supports the preceding generalizations. Unquestionably, Professor Kruse is justified in believing that as long as "property rights" are conceived of as unqualifiedly materialistic there can be no satisfactory solution of those problems (80; *cf.* 129-30, 132-34). He skips too lightly, however, over materialism—and time—in remarking that, since food "may be secured" (produced?) today for all, "the social problem of the future must therefore to an increasing extent be of a hygienic and spiritual nature" (98). Everybody can accept, however, his view that law should deal gently "with those aspects of . . . property that are of value to the soul" (86), especially the spiritual relations of the home (92—he notes the special status of the American homestead). It is only "individual" objects, however, that have such values; generic objects—"goods

FRANCIS S. PHILBRICK

for consumption, money, bearer instruments"—have none (88, 103, 142-44).

A reader who is favorably inclined to codification as an escape from the weight and confusion of case-law will find in this volume much that is calculated to alter that inclination. Repeatedly the author expresses satisfaction with the absence from Scandinavian legislation of definitions of basic conceptions and principles (120, 129, 138, 285, 422, 425). "Natural justice,"—by which is meant what is "equitable and in conformity with practical considerations" (288)—he declares "is the most important source of law in the field of Danish property law" (153; *cf.* 285). Repeatedly, too, a reader notes in foreign law developments similar to our own, but *particularly* in Scandinavian law. For example, take the problem of accession (288-305). Like our law, Danish law has rejected the Roman dogma that land, when involved, was necessarily primary, buildings accessory; likewise the unworkable Roman distinction between specification and accession, and with this, necessarily, any possibility of resting priority on a distinction between "production" and accession. What, then, does justice require? The answer in both legal systems, is: due attention to relative economic contributions, but subject to control by the distinction between good and bad faith. Professor Kruse would add, with attention, also, to special personal—or "spiritual"—interests of the parties, such as equity has sometimes heeded in our system. Such lessons in comparative law are among the most interesting features of the volume.

Save for some of the opening pages of the volume, the translation is satisfactory. The English definite article, however, causes some trouble throughout, as illustrated in the above quotations.

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The Constitution—Revised Version

(*Continued from page* 328)

not sound fiscal policies are followed. The popular desire for economic security through government has dominated, in the main, over that of protection in fundamental personal rights against government. Especially in the past few years, the Supreme Court has yielded to both the dominant activities of government and the philosophy underlying them. It has placed no check upon governmental competition;[59] none upon governmental spending;[60] none upon the lending and granting of governmental funds to those who would be enabled to compete with existing business.[61] It has, on the other hand, favored economic security by compulsion of government;[62] it has favored legal compulsion seeking parity of bargaining power for employees with employers; it has favored taxing programs seeking greater revenue for increased governmental costs. It may be doubtful whether or not the Court could have done otherwise in view of the loose character of constitutional restraints; although dissentients in the Court have vigorously maintained the contrary. In substance, during the past several years of continuing business depression, in contrast with its earlier years, a majority of the Court may conceivably have been convinced of the soundness, if it be such, of the theory that the Court ought also to be an "adjunct to make Democracy work."[63]

Revision of the Constitution which is predicated upon a conception of a weak State, in order that the minority might be protected against the majority, appears evident in this reactive interpretation by the Court under the impact of economic depression. A powerful State with but few constitutional restraints; a powerful State with huge financial resources; a Socialistic State superimposed upon the several States through grants-in-aid and matched doles, has been born and has grown to menacing proportions. Before it, the individual unorganized and alone, the several States, the Supreme Court, and the Constitution as earlier interpreted are in retreat. Here, in my judgment, is the most marked form of the "revised version" of our Constitution.[64]

59. *Ashwander v. T.V.A.* (1936) 297 U. S. 288; *Tenn. Power Co. v. T.V.A.* (1939) 306 U. S. 118.

60. With the exception of *U. S. v. Butler*, supra, note 32.

61. *Duke Power Co. v. Greenwood County*, supra, note 41.

62. *Stewart Mach. Co. v. Davis* (1937) 301 U. S. 548; *Carmichael v. So. Coal & Coke Co.* (1937) 301 U. S. 495.

63. Supra, note 14.

64. Lord Bryce was of the opinion that the framers of our Constitution, "wiser than Justinian before them or Napoleon after them," foresaw the necessity of judicial commentary. Vol. 1, p. 375, "The American Commonwealth." The "revised version" of the Constitution is thus "constitutional" whether one likes it or not.

Leading Articles in Current Legal Periodicals

By Kenneth C. Sears
Professor of Law, University of Chicago

ADMINISTRATIVE LAW

Administrative Censorship: A Study of the Mails, Motion Pictures and Radio Broadcasting, by Theodore Kadin, in 19 Boston University L. Rev. 533. (Nov., 1939).

This lengthy discourse of fifty-three pages is too wordy but it gathers together many interesting facts and much discussion of the cases. The author concludes that there is too much censorship in the mails, motion pictures, and radio broadcasting and that court review of the administrative action is not a sufficient safeguard. Apparently it is not argued on the basis of present knowledge that censorship can be wholly avoided. But that seems to be the desire. What is definitely advocated is to analyze the social danger. "Except in reference to the Espionage Acts during wartime only, it does not appear that any of the censorship statutes are based upon any applied knowledge. It may be that the censor is tilting at windmills."

INTERNATIONAL LAW

The Eighteenth Year of the Permanent Court of International Justice, by Manley O. Hudson, in 34 American Journal of International Law, 1. (Jan., 1940).

Despite the war the court is still functioning. Three judgments were entered and one new proceeding was instituted during 1939, which closed with two cases on the docket. The three judgments are set forth at some length and they probably will interest those who have a specialized knowledge of international law. It is interesting that in no instance was the court unanimous and that Judge Manley O. Hudson dissented from all three judgments. History has it that he was born in Missouri. The outbreak of the war, as might be expected, caused some States to qualify their commitments, both as to jurisdiction and, apparently, as to funds. The salaries of the judges have been reduced. The Council has recommended a reduction of the pensions of the retired judges. 1939 was the year for the third general election of all the judges. Nominations were made but due to the war no election occurred.

(*Continued on page* 381)

Acme

HON. MANLEY O. HUDSON
Judge of the Permanent Court of International Justice

Professional Ethics

(*Continued from page* 347)

Mrs. Curtis Bok was chosen foreman of the jury. The other members are equally prominent Philadelphians.

Lawyers Concerned About Free Service by Attorneys

The current issue of the Missouri Bar Journal carries a report to the Lawyers Association of the Eighth Circuit, of which Gus O. Nations is author, in which he proposes a minimum fee schedule designed particularly to cover that class of services which most lawyers now perform without charge.

The report discusses at length the problem of uncompensated legal service, and asserts that the practice of rendering such service has resulted in part from inefficient office management but chiefly from the attorney's natural reluctance to make a charge for what others are doing without charge.

Practically every one in St. Louis, the report remarks, knows some lawyer whom he can call on the telephone and from whom he can obtain free advice on questions that can be answered without research or consideration. Yet even if no research is required the answer has value, else the question would not be asked. It is expert advice, requiring the exercise of that skill and learning which the lawyer has acquired at great expense.

The giving out of this free advice is asserted to be unfair not only to the lawyer but to the profession as well, for such indulgence by some lawyers forces the practice upon others.

The report says that the custom of failing to charge for small but nevertheless valuable service came about primarily because of the absence of a standard by which such services could be valued and the fear that whatever charge was made would be regarded by the client as excessive and by other lawyers as inadequate.

What a Local Bar Can Do*

By SEFTON DARR

IN ORDER for our organization to be truly great, we must get it out of our minds, and out of the mind of the public, that we are a mutual aid and library association. To us is given the opportunity to re-establish our leadership in this community. . . All around us changes are occurring daily in the fundamentals of our existence. There has been, and there is still going on, an economic revolution. . . Leadership does not consist of remedying situations which have reached emergency or scandal proportions, but rather of anticipating the possibilities of a situation and doing what is necessary to prevent molehills from growing into mountains. Prevention, rather than cure, will eliminate festering sores which now plague the legal profession. . . It is not likely that laymen will trust us to cure evils to which we have contributed, but we will be acknowedged as leaders, and will be so supported, only if we prevent abuses and injustices from occurring. Confidence and respect is not gained when action is forced; it is only so when vision, broadmindedness and unselfishness prompt action in the interest of the social order. . .

May I, therefore, urge upon you this general program for the future consideration of this Association?

Justice for the Poor

First, the sponsorship and active support of all efforts and legislation to assist the poor and needy of this city in securing justice without cost and without undue delay. This can be accomplished through the maintenance and support of legal aid, through the public defender program, and through the encouragement of the Small Claims Court, the processes of arbitration, and the settlement of disputes without resort to formal litigation.

Second. Active efforts to bring about legislation which will modernize the City of Washington in all matters pertaining to law and its enforcement, particularly the creation of a Judicial Council.

Third. Active and lively interest in all matters affecting all of the people of the District of Columbia, including taxation, form of government, and all legislation general in its nature.

Fourth. A closer relationship with the public, and unselfish devotion to the city and its interests, with particular reference to the problems of the underprivileged.

Fifth. The development of an alert civic-mindedness and social conscious Bar Association, interested in all which pertains to the welfare of the public of the community in which we work and live.

Sixth. Suffrage for the District of Columbia, and *lastly*, the doing of whatever will tend to raise lawyers in public esteem, restore confidence and respect, to the end that we may rise again to our rightful position as leaders in this community.

Sphere of Influence of the Individual Lawyer

In the very nature of things, not every lawyer can become an officer of this Association. Not everyone can become a chairman of important committees. Only a few can reach positions of great prominence and public leadership. But every single one of you can create his own sphere of influence. Every single one of you can use his talents for the good of the profession. For life itself is centered in the sphere of every-day affairs; and every-day affairs, in our profession as in others, are managed by the individual; and the individual lawyer, in the conduct of his every-day general practice—in his contacts with judges, government officials and his own clients, has a tremendous sphere of influence—and at the same time a tremendous professional and public duty to perform. In a very real way he *is* the legal profession, and carries a great onus as he performs the more or less prosaic tasks of his every-day work—just as the private soldier in the ranks carries the real burden of military battle.

SEFTON DARR

If judicial reforms appear desirable, although not absolutely necessary at the time, let us be the first to propose these reforms. If new legislation seems necessary to meet our new economy, let the organized bar call attention to it and suggest such legislation. Let us not confine our study to law books, nor confine our veneration to the decisions of truly great judges who lived in a time and under social conditions as different from ours as day is from night. Let us think rather in terms of progress and of changing conditions and times, and let us strive to convince ourselves that law and its administration should not remain forever static, but should join in the march of time and be alive, and alert to meet conditions as they exist and not as they once existed. Let us strive for orderly changes in the law and procedure. Let us seek the aid of the people of our community in consummating these reforms, rather than to have these people demand the reforms to be made after conditions have become chaotic. Only in this way will we be able to prevent molehills from growing into mountains. Again I say to you that leadership, just like medicine, is not great when it only cures, but its greatness is to be measured by the amount of prevention it accomplishes.

Shall We Lead or Stand Still?

Certain it is, that if we don't act in matters where we should be leaders, action will follow, but we will find ourselves as lawyers sitting on the sidelines all wrapped up in blankets of precedent and *stare decisis*, while time marches on.

*From Mr. Darr's address at close of his term of office as president of the District of Columbia Bar Association, 1939.

Woman and the Law

Ladies and Gentlemen of the Jury

THESE are merely the impressions of one unimportant woman juror who served four weeks on a petit jury in the Federal Court of the Northern District of Illinois. It does not pretend to be an expert discussion of court procedure, and it will have served its purpose if it succeeds in presenting the impressions made on a layman by the administration of justice.

It was February first when I responded with enthusiasm to the summons of the United States Marshal, calling me to serve on the February venire of the petit jury. I had seen the good natured fun poked at the woman jurors by the Chicago Bar Association in its "Christmas Spirits," and had read the numerous stories in the press about juries being "manned" by women. My enthusiasm was composed of an interest in taking a personal part, no matter how small, in the administration of justice, and a sneaking desire to vindicate my sex.

When I arrived in the jury room at the appointed hour I found about seventy-five other people had responded to the same summons. With one exception, the women were all members of the League of Women Voters, who had been recommended by that organization at the invitation of the court. They were all women of education and intelligence, who through their connection with the League had become greatly interested in the problems of government. The men had apparently been chosen at random. There were two chemists, a telephone man, a tavern keeper, several small business men, three laborers, a railroad detective, and others more difficult to classify.

Jury Sworn In

We all felt very important, and at the same time somewhat humble, when we were sworn in by the white-haired judge whose name is known and loved by everyone in Chicago. Having taken the oath, the venire was divided. I went to the court where the Government was to prosecute five defendants for "fixing" bootlegging cases. The court room was filled with well-known bootleggers, and other people who, although not so well known, looked like the bootleggers and gangsters of the movies. When my turn came to be examined, I will have to admit that I walked into the jury box somewhat confident and excited. I did not know then, as I do now, how many prospective jurors are excused, especially in criminal cases, for all kinds of reasons. My father is a lawyer and I thought I knew how to conduct myself in court so that I would be accepted at once. I soon found that I was not so smart as I thought I was, for the District Attorney looked me over from head to foot, went into a huddle with his associates, and after a few routine questions, to my great disappointment, excused me!

The next ten days, those of us who had been rejected in this case appeared very promptly and sat around the jury-room most of the day, hopefully at first, impatiently at last. Cases seemed to be continually settled out of court, postponed, or tried by a judge. But we had to come anyhow, to be ready for emergencies. The constitutional right of jury trial, which seemed very fine at first, became very boring at last, as we sat around playing cards, knitting, or talking to the Deputy Marshal. The latter told us that the chief difference between men and women jurors was that the former sat around waiting for something to happen, while the women sat around *asking* when something was going to happen. For this arduous labor we were all paid $4.00 per day. The men took it all philosophically, but the women spent a great deal of time trying to think of some way to prevent what seemed to be such a waste of time and money.

A Case at Last

On the 11th day we were summoned to serve on a damage case. One of the lawyers was very much prejudiced against the League of Women Voters and, before he examined any of us, spent about ten minutes telling the women to forget all they had learned about the duties of jurors. All the information we had, had been given us by members of the Bar Association and distinguished judges, but he seemed to think that the less we knew the better. This was the first time that this idea had been brought out into the open, but we thought we had noticed it in the rejection of jurors in the case referred to above. After several jurors had been excused, the panel was finally completed. It consisted of six men and six women.

Walinger

THE JUDGE

The damage case proved very interesting. It resulted from an automobile accident in which three young girls had been killed, and three others badly injured. The plaintiffs, the defendants, and the witnesses were all typical of the kind that are found in small towns all over this country. Their honesty, sincerity, and self-respect were obvious to all. Their interest and respect for the court were also apparent. This case, like the bootleg case I referred to above, in reality was six cases in one, as is possible under the new rules of civil procedure in the Federal Courts. We found that hearing the six cases at the same time, gave us a much better picture of the whole thing in spite of the fact that there was too much repetition of the same details by the different defense lawyers.

Having seen the take-off on women jurors at the Bar Association, I was very much amused to see that the lawyers were in reality very conscious of the fact that there were women in the jury box. They showed it in several ways. One of them appeared in a different suit every day with a different collar and a shirt of brilliant hue. We finally got to betting amongst ourselves what he would wear the next day! They all seemed to feel that women knew little of the hard realities of life and the law, and might be swayed by the fact that the plaintiffs were children. I wonder what they would have thought if they had known that when the case finally reached the jury, the women, instead of being influenced by their emotions and feeling sorry for the children, felt that they should all have been spanked!

Trial Tactics

I was also interested in the clever way in which the different lawyers managed to extract the information they desired from unwilling witnesses, in spite of the objections, often sustained by the judge, and I couldn't help wondering whether jurors were supposed to be made of stone when they were told to disregard certain things. There was continual bickering among the lawyers, alternated with excessive sarcastic politeness towards each other, which seemed to consume a lot of unnecessary time. The men on the jury all looked on this as part of the game, however, but the women did not regard the trial of a case as a sporting event, and were always pleased when the judge called the lawyers to order, as he frequently did.

Another thing that interested me was the attempt to discredit the character of witnesses, and to confuse them, or make them state the accuracy of certain facts, such as the speed of a car, where it was manifestly impossible to do so. In this particular case all of the witnesses, the plaintiffs, and the defendants (most of them children) were of such obvious honesty that attempts to discredit their personal character disgusted the jury. I couldn't help but think it too bad for these young people to be disillusioned by the unfair treatment some of them received and I was very glad when the judge reprimanded one of the lawyers severely. When finally the attorneys summed up the evidence we all felt that there was too much repetition, and that it would have been much better if one of the lawyers for the defense had made the summary for all, as was done for the plaintiffs. As in all such cases there was contradictory evidence, and what seemed contradictory interpretations of evidence. The judge, however, gave us such excellent instructions as to what the law bearing on the case was, that we really felt that this was the most valuable part of the whole proceeding.

Root Studio

THE JUROR

Finally on the ninth day we got the case and returned our verdict, agreeing to it on the first ballot.

Having done this, again we sat around for ten days, receiving $4.00 a day for playing bridge, knitting, and talking. A few of us were called to serve on what seemed unimportant cases. The rest of us, after being dismissed for the day, spent as much time as possible visiting other courts in the building. Some of the cases were given a directed verdict by the judge, and should never have been brought into court. This made us wonder whether there could not be some system adopted to settle more cases out of court. We also got to speculating whether there could not be some better system of calling the venires. For example, there was one man on a certain venire who could neither read nor write, and could speak very little English.

Jurors Take "Busman's Holiday"

One day we visited the bootleg case referred to above. Several men now serving terms in prison had testified to having cases "fixed" by the defendants. They were followed on the witness stand by three distinguished judges of the Federal Court, who had known two of the defendants during the time they were accused of accepting bribes. These judges testified that the defendants were men of good reputation. We wondered just what effect this was supposed to have on the jury, and just what the value of character witnesses was. In this case, did the defense expect anyone to believe that the judges would have known of any such deals made by the accused? In our inexperience it seemed that the defendants certainly would not have divulged any such plans to the judges.

Some of us had visited the municipal courts in Chicago. As we went around to the different courts in the Federal Building we could not help but see the greater prestige and dignity in the latter as compared to the former. The federal judges presided with great dignity and pride over their courts, and were apparently men of legal attainments themselves. To our untrained eyes, they seemed to command a great deal more respect than the judges in the municipal courts, who are nominated by political organizations. We noticed also that in most cases the Federal District Attorney's assistants conducted their cases in a more efficient manner than the State's Attorney's assistants. This in turn seemed to put the lawyers more on their mettle, resulting in better preparation on their part.

Suggestion to Men Lawyers

When the final day came, and I was handed a voucher for nearly a hundred dollars, I felt a decided let-down. Life would seem very tame for awhile, but I knew that my real richness was not in the money I received, but in the broadening of my experience and point of view. I had only one regret. I wished lawyers would treat women jurors as human beings. They seemed to think that our point of view and our way of thinking was peculiar to our sex. In reality our ideas are determined by our experience, and on the whole do not differ very much from those of men. We are no better and no worse, and we prefer to be judged on our merits rather than our sex.

L. T. S.

WOMAN LAWYER DEFENDS PROPOSED "EQUAL RIGHTS" AMENDMENT

By HELEN ELIZABETH BROWN
Legislative Chairman, Women's Bar Association of Baltimore

IT was a jolting surprise to find in the February JOURNAL an article, signed by the initials L. T. S., treating with levity and bias the subject of Women and the Law. This is an issue of gravest importance to the so-called democracy of the United States, especially in view of the astounding fact that citizens who are also women have been excluded from the protection and benefits of the Constitution by judicial decree in many states and very definitely by the Supreme Court of the United States. By a tortuous process which passes for judicial reasoning, the plain, common-sense language of the Constitution has been distorted until women have been forced out of that "charter of liberty" and it is now a document for men only.

Women Are Not Yet Full Citizens

Women of the United States have little cause to cheer for the Supreme Court on its 150th anniversary. It has erected a solid barrier between them and their Constitutional rights. Oh, yes, women are citizens, said the court, and the Constitution does say that the rights of citizens can not be abridged by state or nation and that no person can be deprived of life, liberty or property without due process of law or denied the equal protection of the laws, but a woman is a peculiar kind of citizen, a sort of sub-citizen, and all these things can be legally done to her (*Minor v. Happersett*, 21 Wall. 162). This was judicially decreed almost a century after a war was fought and a "free" nation established on the theory that taxation without representation is tyranny.

Just two years before, the Supreme Court was shocked that the Constitution should be invoked as entitling a woman to pursue the profession, occupation or employment of her choice. In a somewhat involved mixture of words, Mr. Justice Bradley said the Fourteenth Amendment could not be used to protect women against unequal laws which were "a barrier against the right of females to pursue any lawful employment for a livelihood." To do so, he said, would assume "that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation or employment in civil life." There was no inequality or discrimination in the Illinois statute the courts were construing but the courts injected discrimination into it and enforced it accordingly, at the same time protesting it was not their province to make laws.

The Myra Bradwell Case

The furore was caused when in 1872 Myra Bradwell of Illinois, who was fully qualified, applied to the Supreme Court of Illinois for a license to practice law in accordance with the procedure prescribed by law for any "person" who wished to practice law. Because she was a woman and married (although the record before the court did not show she was married), the license was denied. Her contracts would not be valid because she was married, the court said, and besides, even if the legislature did not exclude women, it must have intended to do so because we adopted the common law of England and "for a woman to have entered the courts of Westminster Hall as a barrister would have created hardly less astonishment than if she should ascend the bench of bishops or be elected to a seat in the House of Commons." God and nature were called upon to witness that "it belonged to men to make, apply and execute the laws." The Supreme Court upheld such nonsense (*Bradwell v. Illinois*, 16 Wall. 130). Many opinions were written to justify this judgment, these profuse effusions themselves betraying the feeling their writers were on uncertain ground. Quaint notions they were to be coming from men whose grandmothers played an important part in conquering a wilderness. Securely seated on judicial benches these women had helped establish, these judges evidently forgot, if they ever knew, that there had been no permanent colony in this country until women colonists came. One winter had sickened the men. Justice Bradley seized the opportunity to preach a pompous and bombastic sermon by way of a concurring opinion which now evokes not only amused smiles but loud guffaws. But, be it recorded with true American pride, that the distinguished, able and experienced Chief Jus-

Underwood & Underwood
HELEN ELIZABETH BROWN

tice, Salmon Portland Chase, dissented from the judgment of the court and from all the opinions. Nevertheless, women were tossed out of the Constitution.

Following that, the Supreme Court deprived women of their Constitutional right to contract for their own labor which same right it had protected for men by reason of the fact that it was guaranteed to them by the Constitution. This decision added gratuitous insult to injury and injustice (*Muller v. Oregon*, 208 U. S. 412).

Susan B. Anthony

Under the leadership of a greater emancipator than Abraham Lincoln and at least as great a rebel as George Washington—Susan B. Anthony, women, after an unconscionable length of time, broke into the Constitution by means of the Nineteenth Amendment.

After the ratification of that Amendment in 1920, women got some consideration of their Constitutional rights from the Supreme Court—but not for long. In 1923, Mr. Justice Sutherland, speaking for that court, said it could not accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances (*Adkins v. Children's Hospital*, 261 U. S. 525). The court had previously condemned such restrictions for men as violating "the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution" (*Lochner v. New York*, 198 U. S. 45). On the authority of these two cases, the Supreme Court struck down iniquitous labor restrictions for women only which handicapped them and left their competitors free in the struggle for a livelihood. The late Mr. Justice Butler pointed out that it was indeed significant that with the same factual background the New York legislature had passed two laws which were identical with the exception that one applied to all workers, both men and women, and the other subjected women workers only to its restrictions. Both acts were sent to Governor Lehman. Under pressure from men's labor unions, Governor Lehman vetoed the law which applied to all workers and signed the one discriminating against women. Women were spared its unjust consequences by the Constitution through permission of the Supreme Court.

"It is plain," said Mr. Justice Butler, "that under circumstances such as those portrayed in the factual background, prescribing of minimum wages for women alone would unreasonably restrain them in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work" (*Morehead v. New York*, 298 U. S. 587).

Result of Nineteenth Amendment

This was a five to four decision. Woman's hold on the Constitution was not very strong. Mr. Justice Owen J. Roberts was one of the five justices concurring in the judgment of the court. His vote alone gave women the protection guaranteed to all *persons* by the Constitution of the United States. Less than a year later, his vote took it away (*West Coast Hotel Co. v. Parrish*, 300 U. S. 379). Instead of a much vaunted government of laws, the rights of American women are subject to the whims of one man. By control of one judicial decision and in spite of the Constitution, Mr. Justice Roberts made himself labor dictator of women workers of the United States. The *Atkins case* was destroyed but the court was careful to say that the *Lochner case* was not disturbed.

In a powerful philippic dissenting from this unjust judgment, Mr. Justice Sutherland denounced the law under consideration as an invasion of women's constitutional rights. He spoke of the gravity of judicial duty and made some barbed statements about how it should be exercised. But women were again out of the Constitution because one man had exercised what is supposed to be a woman's privilege, that of changing his mind.

Effect of Laws of Some States

Many conscientious lawyers on numerous occasions have had the duty of warning clients who were women and married not to make their homes or invest their money in certain states because the laws of those states will deprive them of their property and subject them to a shabby, humiliating, even insulting legal status for the sole reason that they are guilty of matrimony. If they have children, their plight is worse. Mother is celebrated in lacrimose songs and vapid stories and is completely overwhelmed with sentimentality on a day especially set apart for that purpose, known as "Mother's Day," but mother is not paid the substantial tribute of justice in the laws that govern her. She has been denied the status of "person" and "citizen" under the Constitution. In the eyes of the law, she is a degraded creature.

A common-sense reading of the explicit language of the Constitution expressing its lofty principles of justice would lead anyone endowed with ordinary intelligence to believe that its protection of human rights included human beings. The Bill of Rights says nothing about men's rights or women's rights. It speaks of persons and citizens. The Constitution was established by "We, the People" to form a more perfect union, *establish justice*, insure domestic tranquility, provide

for the common defense, promote the general welfare and secure the blessings of liberty to *ourselves* and *our posterity*. No person, it decrees, shall be deprived of life, liberty or property without due process of law. No state, it proclaims, shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor deny to any person the equal protection of the laws. This is the supreme law of the land—or is supposed to be. Yet there are more than one thousand unconstitutional discriminations against women in the laws of this country.

A "Man's Constitution"

The courts have distorted its plain terms and prejudicially ruled that they protect men but not women. They have made it a man's Constitution. Now that the courts have made it necessary for women to specifically get into the Constitution in express terms of sex by means of an Amendment, what happens? Women who are carrying on the age-old struggle for human liberty are met with the same old fallacies which were advanced and discredited when women entered the Constitution by the Nineteenth Amendment. There is the familiar ignoring of substance and quibbling over form and procedure. Justice does not matter, trivialities are important. Under the Equal Rights Amendment which laws would be retained? Confusion would result. The favorite sophistry is the one about whether the husband will "support" the wife or the wife will "support" the husband, which completely ignores existing conditions and the important fact that even in a money-mad world money in itself will not "support" a family. Neither children nor adults can eat or wear the coin of the realm. Money must be converted into articles and services usable in the maintenance of life and that conversion is as important as the money itself. "Support" and money are not synony-

(*Continued on page 292*)

MYRA BRADWELL
Who Was Refused Admission to the Bar in 1872, Because a Woman

Association Achievements

(*Continued from page 321*)

laws of the Association providing for the House of Delegates, as well as the Rules of Procedure of the House of Delegates, are to be found in 62 ABA Rep. (1937) 1055-1104. The Report of that year and those following contain the proceedings of both houses.

To what extent the new organization has changed the work and the activities of the Association may be reasonably debated. It has not notably changed the character of the organization as it is reflected in the annual meetings. But that the Association acts with a new and greater responsibility is clearly enough indicated both in the range of the questions presented and in the markedly increased participation.

If, by means of an integrated bar or otherwise, the constituent bar associations should come to comprise all the lawyers in their various jurisdictions, the House of Delegates will be in a true sense a body that represents all the lawyers of the country. The Association will then speak, as was hoped long ago, with the accredited voice of the entire profession.

The detailed delimitation of function between the Assembly and the House of Delegates will doubtless be adjusted and readjusted as fuller experience dictates. So far as the body of the profession is concerned, it is particularly provided in Article V, section 10 of the Constitution that the House of Delegates by a majority vote may order a referendum either to the entire membership or to the constituent associations of the House of Delegates, and this referendum shall control the acts of the Association and its agents. How far this referendum will be used and to what extent it will give effective expression to the views of the profession, must be left to future development. It cannot be said, however, that in this latest phase of the Association, no account has been taken of the democratic foundation of our community.

The Future

In the United States of 1878, pioneer activity was still a major factor in economic life. In 1938, the last frontier had long disappeared, and the United States had become a highly and intricately organized industrial community. The change has been reflected in the legal profession. In 1878, the American lawyer was dominated by the English tradition for his substantive law and by a rather loose and haphazard American tradition in the organization of his professional life. In 1938, American law had grown into a maturity of its own, in substance, procedure and professional organization. The American Bar Association has in its growth and expansion faithfully reflected this development. But it has also done much more. It has given a steady direction to a progress that will increase the responsibility of the entire body of lawyers to the community and in the same measure increase the fitness of American lawyers to meet this responsibility.

[THE END]

DECISIONS ON THE FEDERAL RULES OF CIVIL PROCEDURE

FROM BULLETINS 62, 63, 64 AND 65 ISSUED BY THE DEPARTMENT OF JUSTICE

RULE 1—Scope of Rules

Federal Rules of Civil Procedure were made applicable to civil actions in the District Court of the United States for Puerto Rico, effective March 1, 1940, by Act of Congress, approved February 12, 1940.

RULE 2—One Form of Action

Independence Shares Corporation v. Robert J. Deckert; Pa. Co. for Insurances on Lives and Granting Annuities v. Same (C. C. A. 3, BIGGS, C. J., No. 11, 1939, Rehearing denied Dec. 20, 1939).

1. In view of the abolition of procedural distinctions between suits in equity and actions at law, a complaint demanding equitable relief under a statute authorizing suit either at law or in equity which fails to state a good claim for equitable relief but states a good claim for money judgment, may be sustained if amended to demand a money judgment. (Rule 15 (a))

2. An action by a purchaser of securities on behalf of all persons similarly situated for damages resulting from fraud in the sale, alleging that the same misrepresentation was made to each purchaser, may be maintained as a spurious class action. (Rule 23 (a))

Scovill Manufacturing Company v. U. S. Electric Manufacturing Corp. (S. D. N. Y., WOOLSEY, D. J., Jan. 25, 1940).

In an action for trade-mark infringement, brought before the effective date of the New Rules but coming on for trial after said date, if it appears that no injunction is warranted, the court should retain jurisdiction for the purpose of granting an accounting for past infringement. (Rule 86)

RULE 4—Process—Sub. (d)—Summons: Personal Service

Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corporation (W. D. Pa., MCVICAR, D. J., Jan. 24, 1940).

1. Valid service may not be obtained on a corporation by service on an agent of a wholly owned and controlled subsidiary.

2. Valid service on a foreign corporation doing business within the state may be made by service on a managing agent of the corporation.

3. A motion to set aside service of summons and complaint should not be entertained unless made within the twenty-day period for filing answer. (Rule 12 (b))

4. A party may not move to dismiss for lack of venue after denial of a motion made by him to set aside service of process. (Rule 12 (g))

5. The venue privilege is personal and may be deemed to have been waived by failure to assert it seasonably. Failure to assert it for five months after institution of action, while plaintiff took deposition, constitutes such failure.

Sub. (f)—Territorial Limits of Effective Service

Orma L. Gibbs. v. Emerson Electric Mfg. Co. (W. D. Mo., W. D., REEVES, D. J., Feb. 3, 1940).

The rule that process may be served anywhere within the territorial limits of the state in which the district court is held, is limited by the venue requirements. Hence, in a patent suit, in view of U. S. Code, Title 28, sec. 109, jurisdiction over a defendant may be obtained only in the district of which he is an inhabitant or in which he committed acts of infringement and has a regular, established place of business.

RULE 5—Service and Filing of Pleadings and Others Papers—Sub. (a)—Service: When Required

Westmoreland Asbestos Co., Inc., v. Johns-Manville Corporation (S. D. N. Y., MANDELBAUM, D. J., Dec. 29, 1939).

The Rules make no provision for a corrected pleading.

RULE 6—Time—Sub. (c)—Unaffected by Expiration of Term

Dennis Theiss v. Owens-Illinois Glass Co. (W. D. Pa., SCHOONMAKER, D. J., Feb. 19, 1940).

1. A motion for new trial served after the expiration of ten days after entry of judgment, may not be entertained. (Rule 59 (b))

2. The court may not enlarge the time for serving a motion for a new trial. (Rule 59 (b)).

RULE 7—Pleadings Allowed; Form of Motions—Sub. (b)—Motions and Other Papers

Dollie Pickering v. Vera L. Corson (C. C. A. 7, KERNER, C. J., Dec. 18, 1939, Rehearing denied Jan. 11, 1940).

An oral statement of the grounds for a written motion for directed verdict is sufficient compliance with the Rules requiring motions to state the grounds therefor.

E. E. McPherrin v. Hartford Fire Insurance Co. v. Phoenix Insurance Co. (D. of Neb. O. D., DONOHOE, D. J., Feb. 14, 1940).

After leave has been granted to serve a third-party complaint, the proper practice to attack the proceeding is by motion to vacate the order granting leave to serve the third-party complaint and to strike the complaint and not by a motion to dismiss.

RULE 8—General Rules of Pleading—Sub. (a)—Claims for Relief

Clyde L. Myers v. Fred G. Beckman (E. D. Okla., RICE, D. J., Feb. 1, 1940).

A motion to strike under Rule 12 (f) is not a proper method of raising the question of the sufficiency of a

counterclaim or compliance with the rule requiring simplicity of pleading. This should be done by a motion to dismiss.

Ida H. Giesy v. American National Bank of Portland, Ore. Revised opinion superseding opinion rendered on Nov. 1, 1939 (52 Bull. 4), (D. of Ore., McCOLLOCH, D. J., Feb. 9, 1940).

1. Owners of a building leased to a bank which subsequently became insolvent, obtained judgment against it in a state court for rent subsequently accruing and, execution being returned unsatisfied, brought action in the Federal court against the stockholders on their statutory double liability, for the amount of the judgment. Defendants contended that since they were not liable for rent accruing subsequent to the assignment and the action had not been brought for damages, there could be no recovery. *Held,* plaintiff may recover damages since parties should be granted the relief to which they are entitled irrespective of the theory of their pleading.

2. A claim for relief need not indicate the legal theory upon which the pleader predicates his rights.

Frank Jablow v. Neil F. Agnew (S. D. N. Y., CONGER, D. J., Jan. 5, 1940).

Allegations in a complaint that certain matters set forth therein are unknown to plaintiffs or are known to defendants are immaterial and should be stricken.

Sub. (b)—Defenses; Form of Denials

Associates Discount Corporation v. James L. Crow (C. A. D. of C., STEPHENS, A. J., Jan. 29, 1940).

1. A statement in the answer that as to certain material allegations of the complaint defendant has no knowledge sufficient to form a belief, is a sufficient denial.

2. If only part of the material facts are controverted, it is the duty of the court on a motion for summary judgment to make an order specifying such facts and direct that the trial be confined to the issues which remain in dispute. (Rule 56 (d)).

3. In a case tried without a jury, it is the duty of the trial court to make findings of fact at the close of the trial. (Rule 52 (a)).

S. H. Squire v. Arthur D. Levan (E. D. Pa., KIRKPATRICK, D. J., Feb 6, 1940).

A statement that defendant has no knowledge of the truth or falsity of averments in the complaint is not a sufficient compliance with the Rule permitting a denial of knowledge or information sufficient to form a belief as to the truth of an averment.

Sub. (c)—Affirmative Defenses

Hector MacDonald v. Central Vermont Railway, Inc. (D. of Conn., HINCKS, D. J., Jan. 25, 1940).

1. Contributory negligence must be pleaded as an affirmative defense if the state law treats it as procedural and not substantive.

2. Since the state law of Connecticut treats the question of burden of proof on the issue of contributory negligence as procedural, a Federal court in dealing with a claim governed by Connecticut law must likewise treat it as procedural and, applying the provisions of Rule 8(c), require the matter, if relied upon, to be pleaded as an affirmative defense.

3. Unfamiliarity with the Rules is not a valid excuse for failure to demand trial by jury within the prescribed time, particularly in an action commenced after the effective date of the Rules. (Rule 38 (b))

[EDITORIAL NOTE: The foregoing case may be compared with *Francis v. Humphrey* (E. D. Ill., Nov. 2, 1938), 4 Bull. 4, 25 F. Supp. 1, which involved an action for negligence governed by the law of Illinois. The court found that it was the law of Illinois, that the matter of contributory negligence was substantive rather than procedural and hence the Federal courts were bound to follow the Illinois rule requiring the plaintiff to plead freedom from contributory negligence. The two cases are entirely consistent with each other, since the divergent results are due to difference of state law as to what constitutes procedure.]

Sub. (d)—Effect of Failure to Deny

Harry B. Hammerer v. Ray L. Huff (C. A. D. of C., STEPHENS, A. J., Dec. 28, 1939).

Allegations in a petition for a writ of habeas corpus which are not denied in the return to the writ stand admitted. (Rule 81(a)(2))

RULE 9—Pleading Special Matters—Sub. (g)—Special Damage

William W. Gray v. George C. Schoonmaker (E. D. Ill., LINDLEY, D. J., Jan. 25, 1940).

In an action for specific performance, a general allegation of damages in the alternative prayer for relief is objectionable as a mere conclusion of law. The elements of such alleged damage should be stated to enable the court to determine whether a right to recover exists. Such prayer should be dismissed.

RULE 10—Form of Pleadings—Sub. (b)—Paragraphs; Separate Statements

Frank Jablow v. Neil F. Agnew (S. D. N. Y., CONGER, D. J., Jan. 5, 1940).

In a stockholder's derivative action, claims against defendants, some of whom are directors of one corporation and some of whom are trustees in bankruptcy and reorganization proceedings of another corporation, should be separately stated and numbered.

RULE 12—Defenses and Objections—When and How Presented—Sub. (b)—How Presented

Eva E. Leimer v. State Mutual Life Assurance Co. of Worcester, Mass. (C. C. A. 8, SANBORN, C. J., Jan. 5, 1940).

A complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.

Folley Amusement Holding Corp. v. Randforce Amusement Corp. (S. D. N. Y., LEIBELL, D. J., Jan. 4, 1940).

In an action for conspiracy to violate the antitrust laws, defendants' motion to dismiss the complaint for failure to allege that acts complained of were in restraint of interstate commerce, was denied pending service of a bill of particulars, which had been previously ordered, since the bill of particulars, which becomes a part of the complaint, might supply the deficiency in this respect. Leave to renew the motion after the bill of particulars has been filed was granted.

Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp. (W. D. Pa., McVICAR, D. J., Jan. 24, 1940).

A motion to set aside service of summons and complaint should not be entertained unless made within the twenty-day period for filing answer.

Anna Katharine Schlaefer v. Wallace Clayton Schlaefer (C. A. D. of C., RUTLEDGE, A. J., Feb. 5, 1940).

1. The provision of Rule 12 (b) that no defense is waived by being joined with another should not be applied in an action pending on the effective date of the new Rules, in which jurisdiction of the person of the defendant had already been acquired by virtue of his having filed an answer joining objections to jurisdiction and defenses on the merits. (Rule 86)

2. The new Rules may not be applied to actions pending on the effective date thereof in a manner that would nullify retroactively a jurisdiction previously acquired. (Rule 86)

Louisiana Farmers' Protective Union, Inc. v. A. & P. Tea Co. (E. D. Ark., W. D., LEMLEY, D. J., Feb. 9, 1940).

Ruling on a motion for a bill of particulars which raises a question as to the sufficiency of the complaint should be deferred pending determination of a motion to dismiss.

Sub. (e)—Motion for More Definite Statement or for Bills of Particulars

Folley Amusement Holding Corp. v. Randforce Amusement Corp. (S. D. N. Y., LEIBELL, D. J., Jan. 4, 1940).

In an action for conspiracy to violate the antitrust laws, defendants' motion to dismiss the complaint for failure to allege that acts complained of were in restraint of interstate commerce, was denied pending service of a bill of particulars which had been previously ordered, since the bill of particulars, which becomes a part of the complaint, might supply the deficiency in this respect. Leave to renew the motion after the bill of particulars has been filed was granted. Rule 12 (b))

U. S. v. Schine Chain Theatres, Inc., (W. D. N. Y., KNIGHT, D. J., Jan. 17, 1940).

1. There is no distinction between a motion for a more definite statement and a motion for a bill of particulars.

2. The words "to prepare for trial" in Rule 12 (e) relate to matters needed by the moving party to frame his pleading and are not intended to enable a party to use a bill of particulars in place of discovery.

3. The function of a bill of particulars under Rule 12 (e) is not the same as that of the former bill of particulars.

J. Leonard Michelson v. Shell Union Oil Corp. (D. of Mass., SWEENEY, D. J., Feb. 2, 1940).

Information in response to an order for a bill of particulars may not be furnished by reference in an amended pleading to exhibits attached to a deposition. Since a bill of particulars becomes a part of the pleading, the information should be included therein.

Hilda Bruun v. Walter H. Hanson (D. of Ia., N. D., CAVANAH, D. J., Dec. 2, 1939).

Production of documents may be ordered even if they relate to information already supplied by a bill of particulars.

Heiman Sapery v. United American Metals Corp. (E. D. N. Y., MOSCOWITZ, D. J., Jan. 25, 1940).

A party should not be permitted to postpone the filing of a bill of particulars until after taking of depositions to obtain information claimed to be necessary to enable him to furnish part of the particulars. He should be required to furnish such particulars as are within his knowledge and state under oath that he lacks knowledge as to others. Information subsequently obtained by depositions may then be included as acquired from time to time in supplemental bills of particulars.

Harry McElwain v. Wickwire Spencer Steel Co. (W. D. N. Y., KNIGHT, D. J., Jan. 17, 1940).

1. In a negligence action, plaintiff may be required to supply a bill of particulars as to the nature of his injuries, and the extent and duration of the disability therefrom.

2. There is no distinction between the provisions in Rule 12 (e) for a more definite statement and a bill of particulars.

3. The discovery provisions of the new Rules serve the purpose of the bill of particulars under the old Equity rules.

Kraft Corrugated Containers, Inc. v. Trumbull Asphalt Co. of Del. (D. of N. J., FORMAN, D. J., Feb. 7, 1940).

Only those particulars should be ordered which are necessary for the formulation of a responsive pleading and are not within the knowledge of the moving party.

Louisiana Farmers' Protective Union, Inc. v. A. & P. Tea Co. (E. D. Ark., W. D., LEMLEY, D. J., Feb. 9, 1940).

1. In an action for treble damages for a conspiracy in restraint of trade under antitrust laws brought by a cooperative marketing association as assignee of the claims of its members against operators of chain grocery stores, in which it is alleged that defendants sold plaintiff's product as "loss leaders," thereby destroying competition and controlling prices of the product, defendants are entitled to a bill of particulars as to plaintiff's title as assignee of various claims referred to in the complaint; plaintiff's charter power to sue for its members; details of the assignments of claims by members, including copies thereof; identity of stores claimed to be dominated by defendants but operated under other names; meaning of the term "loss leaders;" names of the cities and the years in which it will be contended the alleged acts were committed; names of officers or agents of defendant corporations alleged to have participated in the conspiracy; and names of cities in which it will be contended at the trial competitors were adversely affected by defendants' acts; but plaintiff should not be required to furnish further particulars as to the volume of plaintiff's product sold on each day, to whom sold, and the sales methods used, dealings between plaintiff and individual member and grade and price received on each sale, since such information can be obtained by discovery; nor as to the exact times and places at which each defendant sold plaintiff's product as "loss leaders;" or the exact cost to defendants of the product sold in each instance, since such information should be within the peculiar knowledge of defendants; or the names and addresses of individual competitors alleged to be adversely affected; or the exact time and place when the conspiracy was entered into; nor as to the names and addresses of individual stores alleged to have been adversely affected by defendants' acts.

2. Ruling on a motion for a bill of particulars which raises a question as to the sufficiency of the complaint should be deferred pending determination of a motion to dismiss. (Rule 12 (b)).

3. The granting or refusal of a bill of particulars rests in the sound discretion of the court.

4. Matters of evidence are not required to be stated in a bill of particulars.

5. A bill of particulars will not ordinarily be granted as to matters peculiarly within the knowledge of the moving party.

6. The scope of a bill of particulars should ordinarily be limited to matters required to formulate a responsive pleading and *generally* to prepare for trial, while particular information needed in preparation for trial should be procured by discovery.

Sub. (f)—Motion to Strike

Milton J. Teiger v. Stephan Oderwald, Inc. (S. D. N. Y., LEIBELL, D. J., Jan. 5, 1940).

The sufficiency of affirmative defenses may be tested by a motion to strike.

Clyde L. Myers v. Fred G. Beckman (E. D. Okla., RICE, D. J., Feb. 1, 1940).

A motion to strike under Rule 12 (f) is not a proper method of raising the question of the sufficiency of a counterclaim or compliance with the rule requiring simplicity of pleading. This should be done by a motion to dismiss.

Sub. (g)—Consolidation of Motions

Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp. (W. D. Pa., MCVICAR, D. J., Jan. 24, 1940).

A party may not move to dismiss for lack of venue after denial of a motion made by him to set aside service of process.

RULE 13—Counterclaim and Cross-Claim—Sub. (a)—Compulsory Counterclaims

Clyde L. Myers v. Fred G. Beckman (E. D. Okla., RICE, D. J., Feb. 1, 1940).

1. Defendant, in an action for declaratory judgment as to validity and infringement of a patent and for unfair competition, may counterclaim for damages for infringement of the patent. (Rule 57).

2. A motion to strike under Rule 12 (f) is not a proper method of raising the question of the sufficiency of a counterclaim or compliance with the rule requiring simplicity of pleading. This should be done by a motion to dismiss. (Rule 8 (a); Rule 12 (f)).

B. C. Schram v. William Alfred Lucking (E. D. Mich., S. D., PICARD, D. J., Jan. 30, 1940).

Defendant in an action to enforce stockholder's liability may counterclaim for rescission of the purchase of the stock by him and for damages, on the ground that the transaction was brought about as a result of a mistake of law.

Sub. (g)—Cross-Claim Against Co-Party

Flora Grodsky v. E. M. Sipe—In re Charles Cassell (E. D. Ill., LINDLEY, D. J., Jan. 6, 1940).

1. Failure to assert a cross-claim in an action in a court of a state, the laws of which do not make such cross-claims obligatory, does not bar a subsequent action on the claim which could have been asserted by such cross-claim.

2. *Query*, whether failure to interpose a cross-claim in a Federal court under Rule 13 (g) bars a subsequent action thereon.

RULE 14—Third-Party Practice—Sub. (a)—When Defendant May Bring in Third Party

U. S. A. v. United States Fidelity & Guaranty Co. v. Dr. Arthur J. Kolling (D. of Minn., 4th D., NORDBYE, D. J., Feb. 1, 1940).

In an action against the surety on a bond, the surety may bring in as third-party defendant, the principal who has agreed to indemnify surety.

Mrs. Octa Whitfield Gray v. Hartford Accident and Indemnity Co. v. J. A. Robison (W. D. La., S. D., PORTERIE, D. J., Feb. 3, 1940).

1. In an action for personal injuries resulting from a collision between an automobile and a truck, in which a passenger of the automobile, who was the wife of the driver and owner thereof, sued the liability insurance carrier of the truck owner, defendant impleaded the plaintiff's husband and his liability insurance carrier alleging that the accident was due solely to his negligence and, in the alternative, that the drivers of the two vehicles were joint tort feasors.

2. In a tort action governed by Louisiana law, which under certain circumstances provides for contribution between joint tort feasors, the defendant may bring in a joint tort feasor as a third-party defendant.

3. A third-party proceeding is ancillary to the main action, and consequently does not require an independent ground of Federal jurisdiction.

4. In a third-party proceeding, it is not necessary to comply with venue requirements.

5. Rule 14 precludes a right of election of defendants in the original plaintiff. The defendant may bring in parties primarily liable to plaintiff, irrespective of plaintiff's election.

6. Privity is not required as between third-party plaintiff and third-party defendant.

7. Defendant's right to implead plaintiff's husband as a third-party defendant in an action for personal injuries is not barred by a state procedural rule which denies a wife the right to sue her husband, if the substantive law of the state recognizes the wife's claim for damages resulting from personal injuries as being her property, since the state procedure does not govern Federal courts.

Louise Satink v. Township of Holland v. Lehigh Valley Railroad Co. (D. of N. J., FORMAN, D. J., Feb. 7, 1940).

1. If a third-party defendant is brought in on the ground that he is primarily liable to plaintiff, but the latter declines to amend his complaint so as to pray for relief against the third-party defendant, the order granting leave to bring in the third party should be vacated.

2. In an action for personal injuries brought by passenger of an automobile against a township, alleging defendant maintained a defective highway, the driver of the automobile was impleaded as third-party defendant on the ground that he was directly liable to plaintiff. Plaintiff refused to amend his complaint so as to pray for relief against the third party. *Held*, order to bring in third party should be vacated.

[EDITORIAL NOTE: Rule 14 permits a third-party defendant to be brought in if he is either (1) secondarily liable to the original defendant, or (2) primarily liable to the original plaintiff. In cases of the second type, the question arises as to what disposition should be made of the matter, if the plaintiff declines to amend his complaint and assert a claim against the third-party

defendant in addition to that directed against the original defendant. The Rules do not expressly solve this problem.

The existence of the problem was suggested by Judge Luhring in *Crim v. Lumbermens Mutual Casualty Company* (D. C., D. of C., Mar. 3, 1939) 22 Bull. 12, 26 F. Supp. 715. In *General Taxicab Association, Inc., v. O'Shea* (U. S. C. A., D. C., Jan. 15, 1940) 60 Bull. 3, the United States Court of Appeals for the District of Columbia affirmed an order denying a motion for leave to bring in a third party, in a case in which the plaintiff had indicated he would not amend his complaint. The action of the appellate court was, however, predicated entirely on the ground that the matter was within the discretion of the district court.

In the instant case, as well as in *Gray v. Hartford Accident and Indemnity Company v. Robison* (W. D. La., Feb. 3, 1940) 63 Bull. 21, the question was squarely presented for decision. In the instant case, Judge Forman holds that a plaintiff may not be compelled to assert a claim against the third-party defendant, and on plaintiff's declination to do so, the third party should not be brought, or having been brought, the order doing so, should be vacated. In *Gray et al. v. Hartford Accident and Indemnity Co. v. Robison*, Judge Porterie reached the opposite conclusion, indicating that under such circumstances a plaintiff should not have a right to elect to pursue one defendant and ignore another.]

E. E. McPherrin v. Hartford Fire Insurance Co. v. Phoenix Insurance Co. (D. of Neb., O. D., DONOHOE, D. J., Feb. 14, 1940).

1. In an action by a shipper for loss by fire of live stock in transit by common carrier, the defendant insurer was not permitted to bring in as third-party defendant, the insurer of the owner of the feeding station, the burning of which resulted in the loss, it appearing that to do so would complicate the procedure, delay trial of the case, and add to the costs of the litigation.

2. After leave has been granted to serve a third-party complaint, the proper practice to attack the proceeding is by motion to vacate the order granting leave to serve the third-party complaint and to strike the complaint, and not by a motion to dismiss. (Rule 7 (b))

3. Whether leave to implead a third-party defendant should be granted is within the discretion of the court.

4. Leave to bring in a third party should be granted only if it will result in simplifying procedure, expedite the litigation and reduce expenses.

RULE 15—Amended and Supplemental Pleadings —Sub. (a)—Amendments

Independent Shares Corporation v. Robert J. Deckert. Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Same (C. C. A. 3, BIGGS, C. J., Nov. 11, 1939, Rehearing denied Dec. 20, 1939.)

In view of the abolition of procedural distinctions between suits in equity and actions at law, a complaint demanding equitable relief under a statute authorizing suit either at law or in equity which fails to state a good claim for equitable relief but states a good claim for money judgment, may be sustained if amended to demand a money judgment.

Orma L. Gibbs v. Emerson Electric Mfg. Co. (W. D. Mo., W. D., REEVES, D. J., Feb. 3, 1940.)

1. Plaintiff, in an action for infringement of a patent in which the complaint is dismissed for want of capacity to sue on the ground that plaintiff is merely a co-tenant of the patent, may subsequently acquire the interest of his co-tenant, and amend the complaint to show that he is the owner of the patent.

2. The rule that process may be served anywhere within the territorial limits of the state in which the district court is held, is limited by the venue requirements. Hence, in a patent suit, in view of U. S. Code, Title 28, sec. 109, jurisdiction over a defendant may be obtained only in the district of which he is an inhabitant or in which he committed acts of infringement and has a regular, established place of business. (Rule 4 (f))

Sub. (c)—Relation Back of Amendments

Estebania Echevarria v. The Texas Co. (D. of Del., NIELDS, D. J., Feb. 17, 1940).

In an action by an administratrix for wrongful death, it was held that the letters of administration were invalid because granted by a court having no jurisdiction. Subsequently plaintiff procured valid letters. *Held*, an amendment to the complaint pleading her second appointment as administratrix relates back to the date of filing of the original complaint and the expiration in the meantime of the period prescribed by the statute of limitations does not bar the action.

RULE 17—Parties Plaintiff and Defendant; Capacity—Sub. (b)—Capacity to Sue or Be Sued

Donald Bicknell v. Marjorie Fleming Lloyd-Smith —Reversing 44 Bull. 21. (C. C. A. 2, L. HAND, C. J., Feb. 19, 1940.)

1. A statutory receiver of a Michigan bank appointed by the Commissioner of the State Banking Department of that state may sue in the Federal courts in New York, since the laws of the latter state permit suits therein by foreign receivers.

2. A statutory receiver appointed by the administrative officers of one state may sue in a Federal court in another state if the law of the latter state does not require the appointment of an ancillary receiver for that purpose.

3. The capacity of a foreign receiver to sue is determined by the law of the state in which the district court is held.

4. The provision of Rule 66 that the practice in the administration of estates by receivers appointed by the court shall be in accordance with the practice prevailing in Federal courts prior to the new Rules, relates only to receivers appointed by Federal courts. (Rule 66).

RULE 18—Joinder of Claims and Remedies—Sub. (b)—Joinder of Remedies; Fraudulent Conveyances

Glenn E. Lee v. Charles R. Matheny. (D. of C., LETTS, J., Jan. 11, 1940).

Rule 18 (b) is construed to apply only to cases where there are at least two distinct claims or causes of action and not to a case which involves only one cause of action which may give rise to legal or equitable relief or both.

RULE 19—Necessary Joinder of Parties—Sub. (b) —Effect of Failure to Join

Richard W. Norton v. United Gas Corporation. (W. D. La., S. D., DAWKINS, D. J., Feb. 7, 1940).

1. In an action for declaratory judgment to determine the rights of the lessor under mineral leases, lessor's assignees of other rights in the leases are not in-

dispensable parties and need not be joined if to do so would deprive the court of jurisdiction of the parties already before it. (Rule 57)

2. Requirements with respect to joinder of parties apply to actions for declaratory judgments equally with actions to recover money or specific property. (Rule 57)

3. In actions for declaratory relief, parties need not be joined merely because they have an interest in the subject matter of the litigation. (Rule 57)

RULE 20—Permissive Joinder of Parties—Sub. (a)—Permissive Joinder

Mutual Life Insurance Co. of N. Y. v. Carlton R. Benton (W. D. Mo., W. D., REEVES, D. J., Feb. 8, 1940).

1. An insurance company suing an annuitant for a declaratory judgment to determine its right to retain premiums paid for the annuity, may join an alleged heir of the annuitant who has challenged the validity of the annuity contract, as a party defendant. (Rule 57)

2. The rules relating to joinder of parties apply to suits for declaratory judgments. (Rule 57)

RULE 23—Class Actions—Sub. (a)—Representation

Independence Shares Corp. v. Robert J. Deckert Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Same (C. C. A. 3, BIGGS, C. J., Nov. 11, 1939. Rehearing denied Dec. 20, 1939.)

An action by a purchaser of securities on behalf of all persons similarly situated for damages resulting from fraud in the sale, alleging that the same misrepresentation was made to each purchaser, may be maintained as a spurious class action.

Sub. (b)—Secondary Action by Shareholders

Frank Jablow v. Neil F. Agnew (S. D. N. Y., CONGER, D. J., Jan. 5, 1940).

1. The complaint in a stockholder's derivative action, removed from a state court solely on the ground of a Federal question, need not aver that plaintiff was a shareholder at the time of the transaction of which he complains or that his share devolved on him by operation of law. (Rule 81 (c))

2. In a stockholder's derivative action, claims against defendants, some of whom are directors of one corporation and some of whom are trustees in bankruptcy and reorganization proceedings of another corporation, should be separately stated and numbered. (Rule 10 (b))

3. Allegations in a complaint that certain matters set forth therein are unknown to plaintiffs or are known to defendants are immaterial and should be stricken. (Rule 8 (a))

RULE 26—Depositions Pending Action—Sub. (b)—Scope of Examination

Radio Corporation of America v. Samuel Solat (S. D. N. Y., CONGER, D. J., Jan. 18, 1940).

A party may not be examined as to whether he has violated a restraining order issued in the action, in the absence of any proceedings to punish for contempt.

RULE 30—Depositions Upon Oral Examination—Sub. (b)—Orders for the Protection of Parties and Deponents

Radio Receptor Co., Inc. v. General Motors Corp. (S. D. N. Y., COXE, D. J., Dec. 28, 1939).

1. Defendant was permitted to examine officers of plaintiff corporation as to allegations in the complaint that former employees of plaintiff revealed trade secrets to defendant together with information as to plaintiff's sources of supply and the details of plaintiff's proposed bid on Government contracts, even though such examination may involve disclosing plaintiff's trade secrets.

2. Although plaintiff in an action for damages to his business alleges that he has been in such business "for the past four years," general evidence regarding the growth, financial condition and relative position of plaintiff in the field is relevant and examinations before trial of officers of plaintiff corporation should not be limited as to the four-year period.

RULE 33—Interrogatories to Parties

Rebecca J. Creden v. Central Railroad Co. of N. J. (E. D. N. Y., MOSCOWITZ, D. J., Jan. 24, 1940).

1. In a personal injury action, plaintiff may propound interrogatories to defendant dealing with the time of the report to the defendant of the accident and by whom and to whom made, since such information bears upon the bona fides of plaintiff's claim.

2. Interrogatories to defendant in a personal injury action may properly request the names of eye-witnesses to the accident and also the names of witnesses who were present but who did not see the accident.

3. Interrogatories may not be propounded concerning the substance of statements made to the defendant by witnesses in the absence of a showing why such information cannot be secured from the witnesses by depositions.

4. Plaintiff in a personal injury action should be permitted to ascertain by interrogatory to defendant, the name of the person who took plaintiff's statement of the accident.

5. In a personal injury action, interrogatories to defendant dealing with similar equipment and accidents are proper.

C. H. Dixon v. Mary H. Phifer (W. D. S. C., LUMPKIN, D. J., Nov. 15, 1939).

1. A litigant's right to discovery through resort to interrogatories is limited only by rules of relevancy.

2. A party should not be delayed in the exercise of his rights under Rule 33 until the trial.

Graver Tank and Manufacturing Corp. v. James B. Derry Sons Co. Inc. (W. D. Pa., SCHOONMAKER, D. J., Feb. 8, 1940).

1. Interrogatories by defendant before the filing of an answer should be limited to those which appear relevant solely from an examination of the complaint.

2. In a negligence action, interrogatories by defendant may be directed to details of plaintiff's injuries and other damages.

3. Interrogatories should be relatively few and relate to the important facts rather than to minor evidentiary details. A more comprehensive examination may be had by taking a deposition.

RULE 34—Discovery and Production of Documents and Things for Inspection, Copying, or Photographing

Kazimera Zalatuka v. Metropolitan Life Insurance Co. (C. C. A. 7, TREANER, C. J., Dec. 22, 1939).

1. In an action on an "accidental death" clause of a life insurance policy, an order staying proceedings until plaintiff complied with an order under Rule 34

directing her to consent to exhumation of the body of the deceased, is not a final judgment so as to permit appeal therefrom after expiration of the time limited for appeals from interlocutory orders. (Rule 73 (a))

2. In an action on an "accidental death" clause of a life insurance policy, court directed plaintiff to consent to exhumation of body of deceased.

Hilda Bruun v. Walter H. Hanson (D. of Ia., N. D., CAVANAH, D. J., Dec. 2, 1939).

1. An order directing production of documents may reserve the question of materiality and privilege as to whether inspection should be permitted until they are submitted to the court.

2. Production of documents may be ordered even if they relate to information already supplied by a bill of particulars. (Rule 12 (e))

RULE 36—Admission of Facts and of Genuineness of Documents—Sub. (a)—Request for Admission

Douglas Van Horne v. Frank T. Hines (D. of C., LETTS, A. J., Feb. 7, 1940).

1. If the United States or one of its officers or agencies is a party to an action, a statement on its behalf in response to a request for admission may be sworn to by an Assistant United States Attorney.

2. The statement denying the truth of matters of which an admission is requested need not be sworn to by the party to whom the request is directed but may be sworn to by his attorney, or by any other person who can do so on knowledge or on information and belief.

3. The sworn statement made in response to a request for admission is not subject to a motion to strike.

4. The court may determine whether the sworn statement in response to a request for admission relieves the adverse party of the necessity of proof of the matters contained in the request.

5. The response to a request for admissions need not set out the evidence in support of the statement nor include the names of witnesses to be called.

6. The request for admissions and the statement in response are not part of the pleadings, but relate to the proof.

RULE 38—Jury Trial of Right—Sub. (b)—Demand

Hector MacDonald v. Central Vermont Railway, Inc. (D. of Conn., HINCKS, D. J., Jan. 25, 1940).

Unfamiliarity with the Rules is not a valid excuse for failure to demand trial by jury within the prescribed time, particularly in an action commenced after the effective date of the Rules.

RULE 49—Special Verdicts and Interrogatories—Sub. (b)—General Verdict Accompanied by Answer to Interrogatories

John Voelkel v. Frank D. Bennett (E. D. Pa., KIRKPATRICK, D. J., Jan. 19, 1940).

In an action for wrongful death of a boy brought by his parents and the administrator of his estate, the jury awarded a general verdict for plaintiffs and, in response to special interrogatories, answered that the verdict was for the parents and that nothing was awarded to the administrator. *Held*, that since the general verdict and the answers were inconsistent, judgment might not be entered on the general verdict. The court directed entry of judgment for plaintiff parents and against plaintiff administrator.

RULE 50—Motion for a Directed Verdict—Sub. (a)—When Made: Effect

Dollie Pickering v. Vera L. Corson (C. C. A. 7, KERNER, C. J., Dec. 18, 1939. Rehearing denied Jan. 11, 1940.)

An oral statement of the grounds for a written motion for directed verdict is sufficient compliance with the Rules requiring motions to state the grounds therefor. (Rule 7 (b))

Sub. (b)—Reservation of Decision on Motion

Edward Valanda v. Baum & Reissman, Inc. (M. D. Pa., JOHNSON, D. J., Jan. 29, 1940).

A motion to set aside the judgment and to enter judgment for the moving party notwithstanding the verdict may be treated as a motion to set aside the verdict and the judgment entered thereon and for judgment in accordance with moving party's motion for directed verdict as if it were a motion strictly conforming to Rule 50 (b).

RULE 52—Findings by the Court—Sub. (a)—Effect

Associates Discount Corp. v. James L. Crow (C. A. D. of C., STEPHENS, A. J., Jan. 29, 1940).

In a case tried without a jury, it is the duty of the trial court to make findings of fact at the close of the trial.

James C. Fogle v. General Credit, Inc. (C. A. D. of C., PER CURIAM, Jan. 29, 1940).

In the absence from the record on appeal of the evidence upon which the case was decided and of findings of fact in an action tried without a jury, no review thereof may be had and the case may be reversed and remanded for further proceedings.

RULE 54—Judgments; Costs—Sub. (d)—Costs

Arthur J. Schmitt v. Continental-Diamond Fibre Co. (N. D. Ill., E. D., BARNES, D. J., Jan. 25, 1940).

The expense incurred by the prevailing party in the taking of necessary depositions may be taxed as costs.

RULE 56—Summary Judgment—Sub. (a)—For Claimant

American Insurance Company v. Gentile Bros. Co. (C. C. A. 5, MCCORD, C. J., Feb. 9, 1940).

Summary judgment was properly granted to plaintiff in an action by the insured on a policy insuring against loss of fruit from freezing, it appearing from the pleadings, depositions, and affidavits, that there were no issues of fact with respect to the terms of the policy or the extent of the loss sustained.

Mutual Life Insurance Co. of N. Y. v. Elmo M. Ballard. (S. D. Fla., AKERMAN, D. J., Jan. 31, 1940).

1. Summary judgment should be granted if the court is convinced from the record that if the action were permitted to go to trial a verdict would necessarily be instructed for the moving party.

2. In an action by an insurance company for a declaratory judgment, adjudicating its right to receive premiums under the disability provisions of one of its policies, summary judgment was granted for the insurance company, it appearing that insured was not disabled under the terms of the policy.

Sub. (b)—For Defending Party

Gatch Wire Goods Company v. W. A. Laidlaw Wire Co. (C. C. A. 7, EVANS, C. J., Dec. 11, 1939).

1. Motions for summary judgment may be made in patent suits.

2. In patent suits, motions to dismiss because the patent is void on its face should not ordinarily receive favorable consideration.

Sub. (d)—Case Not Fully Adjudicated on Motion

Associates Discount Corp. v. James L. Crow. (C. A. D. of C., STEPHENS, A. J., Jan. 29, 1940.)

If only part of the material facts are controverted, it is the duty of the court on a motion for summary judgment to make an order specifying such facts and direct that the trial be confined to the issues which remain in dispute.

RULE 57—Declaratory Judgments

Richard W. Norton v. United Gas Corporation. (W. D. La., S. D., DAWKINS, D. J., Feb. 7, 1940.)

In an action for declaratory judgment to determine the rights of the lessor under mineral leases, lessor's assignees of other rights in the leases are not indispensable parties and need not be joined if to do so would deprive the court of jurisdiction of the parties already before it.

Requirements with respect to joinder of parties apply to actions for declaratory judgments equally with actions to recover money or specific property.

In actions for declaratory relief, parties need not be joined merely because they have an interest in the subject matter of the litigation.

Mutual Life Insurance Co. of N. Y. v. Carlton R. Benton. (W. D. Mo., W. D. REEVES, D. J., Feb. 8, 1940.)

An insurance company suing an annuitant for a declaratory judgment to determine its right to retain premiums paid for the annuity, may join an alleged heir of the annuitant who has challenged the validity of the annuity contract, as a party defendant.

The rules relating to joinder of parties apply to suits for declaratory judgments.

Clyde L. Myers v. Fred G. Beckman. (E. D. Okla., RICE, D. J., Feb. 1, 1940.)

Defendant, in an action for declaratory judgment as to validity and infringement of a patent and for unfair competition, may counterclaim for damages for infringement of the patent.

RULE 59—New Trials—Sub. (b)—Time for Motion

Dennis Theiss v. Owens-Illinois Glass Co. (W. D. Pa., SCHOONMAKER, D. J., Feb. 19, 1940.)

A motion for new trial served after the expiration of ten days after entry of judgment, may not be entertained.

The court may not enlarge the time for serving a motion for a new trial.

RULE 60—Relief from Judgment or Order—Sub. (b)—Mistake, Inadvertence; Surprise; Excusable Neglect

Emily R. Moran v. Howard Moran. (D. of C., LETTS, J., Feb. 1, 1940.)

A judgment may not be modified by changing its amount, if more than six months have expired after entry of judgment.

RULE 66—Receivers

Donald Bicknell v. Marjorie Fleming Lloyd-Smith, Reversing 44 Bull. 21. (C. C. A. 2, L. HAND, C. J., Feb. 19, 1940.)

The provision of Rule 66 that the practice in the administration of estates by receivers appointed by the court shall be in accordance with the practice prevailing in Federal courts prior to the new Rules, relates only to receivers appointed by Federal courts.

RULE 68—Offer of Judgment

Eugene A. Nabors v. The Texas Co. (W. D. La., S. D., DAWKINS, D. J., Feb. 19, 1940.)

1. An offer of judgment should not be filed unless it is accepted by a written notice of acceptance. If the offer is not accepted, proof thereof may be made at the trial to avoid costs from date of offer in the event recovery is not more favorable to claimant than that offered.

2. An offer of judgment should be served upon the adverse party by the party making it. It need not be served by the officers of the court.

RULE 73—Appeal to a Circuit Court of Appeals—Sub. (a)—How Taken

Kazimera Zalatuka v. Metropolitan Life Insurance Co. (C. C. A. 7, TREANOR, C. J., Dec. 22, 1939.)

In an action on an "accidental death" clause of a life insurance policy, an order staying proceedings until plaintiff complied with an order under Rule 34 directing her to consent to exhumation of the body of the deceased, is not a final judgment so as to permit appeal therefrom after expiration of the time limited for appeals from interlocutory orders.

RULE 75—Record on Appeal to a Circuit Court of Appeals—Sub. (h)—Power of Court to Correct Record

Lillian Clawans v. Frank White. (C. A. D. of C., PER CURIAM, Feb. 5, 1940.)

If the parties on appeal do not agree as to whether the record truly discloses what occurred in the district court and there is an honest difference of opinion or memory between the appellant and the trial judge, the court's version must be accepted and the appeal will be dismissed unless appellant presents a record bearing the approval of the judge.

Sub. (g)—Record to Be Prepared by Clerk—Necessary Parts

James C. Fogle v. General Credit, Inc. (C. A. D. of C., PER CURIAM, Jan. 29, 1940.)

In the absence from the record on appeal of the evidence upon which the case was decided and of findings of fact in an action tried without a jury, no review thereof may be had and the case may be reversed and remanded for further proceedings. (Rule 52 (a))

RULE 81—Applicability in General—Sub. (a) (2)—To What Proceedings Applicable

Harry B. Hammerer v. Ray L. Huff. (C. A. D. of C., STEPHENS, A. J., Dec. 28, 1939.)

Allegations in a petition for a writ of habeas corpus which are not denied in the return to the writ stand admitted.

Sub. (c)—Removed Actions

Frank Jablow v. Neil F. Agnew. (S. D. N. Y., CONGER, C. J., Jan. 5, 1940.)

The complaint in a stockholder's derivative action, removed from a state court solely on the ground of a Federal question, need not aver that plaintiff was a

(*Continued on page* 380)

The Constitution Today

(*Continued from page 289*)

Just as Nature moves strength to the point of union when union is being effected, when union has been effected it requires of peoples operating systems of free government to move that power back into their democratic governmental organization or pay the penalty which Nature inflicts upon a people who have had an opportunity to cooperate with the plan of Nature and refuse to do it. That is something for the statesmen of America to think about. If the people will not do it voluntarily, they are driven by the lash of tyranny to the performance of their neglected duty. I challenge anybody of any political philosophy to contradict the statement that it is a historically established fact and in harmony with reason that after the formative period of a democratic nation there can be no progress in that system except in that direction which moves the power and necessity to govern away from the center and back toward the people, who are the government.

We are not dealing with an academic thing. We are not dealing with a speculative thing. We are dealing with something that is supported by history and to which common sense must agree, because in a democracy there are no governors except the people.

The States' Governmental Machinery Adapted to Requirements of Democracy

Fortunately for us, the States, not too large territorially and which function in the main through smaller units of government, the chief officers of which are chosen by the people, afford the opportunity and the machinery for the functioning and developing of democratic institutions, and for the development of the governmental capacity of the people, who are the governors in a democracy.

In our whole governmental history all commentators, insofar as I know, agree that the Habeas Corpus Act, Magna Carta, the Petition of Right, the Bill of Rights, and our own Declaration of Independence made great epochs in governmental history, because their effect was to decentralize governmental power and move it back toward the people. On the other hand, no great monument comparable to these can be found along the road which democracy has traveled, marking the place where governmental power and responsibility have been moved away from the people toward the central governmental agency. That is not progress in a democracy.

The Federal organization is a necessary agency of these States to do the things for them which it was created by them to do, but it was never intended to be and never can be the functioning machinery through which the people can discharge the general responsibility of government. It is too big, too far away; the total of its general responsibilities too vast. Its machinery is not adapted to that service. Out of an executive personnel which has now grown to the enormous number of 987,538 persons as of the month of December, 1939, at an annual salary as of that month of $1,827,678,708, only one of this approximately 1,000,000 people is elected. There cannot be any possibility of popular control of such an organization.

Effect Upon Democracy of Loss of State Sovereignty

The States must resume the status of the responsible sovereign agencies of general government or democracy cannot live in America. What is the use in trying to deceive ourselves about that?

When we relieve the States of governmental responsibilities which are within their governmental capacity the power to do the things of which they have been relieved departs from the States. Nature will not permit any power to remain where it is not used. Every time that happens the total governmental strength of the States is lessened and they are left with less and less ability to discharge their remaining duties.

There can be no uncertainty as to the effect of that policy upon the States, especially, when, in addition to that, we tap the sources of the State revenue; bring to Washington the money required by the States to discharge their governmental duties; send a part of that money back to the States as loans and gifts from the Federal Government to the subdivisions of the States, their counties, their cities, their school districts, private businesses, and private citizens, thereby in these matters attaching them directly to the Federal Government and bringing them directly under the operation of the Federal governmental power.

By this process we are not only weakening the States but are actually dissolving them. At the same time, we are destroying the self-reliance, the courage, the stamina, and the governmental capacity of their subdivisions and of the people—the most deadly thing that can be done to a democracy. When we do all these things, we do what the declared enemies of our democracy could not do to the structure of our Government and to the governmental capacity of the people, upon whose capacity to govern our democracy absolutely depends.

It is axiomatic in our system of government—and I think it is axiomatic everywhere—that he who controls the purse strings controls the government. This was demonstrated when the House of Commons got control of the purse strings in England. It took a long time, but now the Commons are supreme because they never turned loose the purse strings.

We are making a similar demonstration in this country, except that it is in exactly the opposite direction. As we increase State and local governmental dependence upon the Federal Treasury, dispensing money which has been got from the people of the States, the Federal bureaucracy tightens its grip upon the purse strings and increases its governmental control.

We have turned back on the course of democratic progress. Progress is not fast. We are going very fast. Progress is uphill. We are going downhill. That is the easy way.

Democrats, Republicans, people of the Nation today celebrating a great occasion, we talk about what these men have done in the days gone by. What are we doing? How well are we doing it? No foreign foe has put his foot on American soil in a hundred years. We have everything in this country that God could give to make a people happy, prosperous, and contented—plenty of material for food, clothing, and shelter; plenty of railroads; plenty of money; plenty of means; plenty of everything—plenty of everything except the intelligence and patriotism required to operate a system of free government. Yet we strut around here and expect people to call us honorable. Shame upon us in America! Shame upon the statesmanship of America! We are all responsible. I take my share and you can take yours.

When we destroy the independent governmental responsibility of the States, the sovereignty of the State is destroyed and the possibility of the preservation of

(*Continued on page 368*)

Comments—Letters

Where Supreme Court Has Sat*

To the Editor:

THE page in the March Journal which shows some views of the first homes of the Supreme Court of the United States and gives text therewith is very interesting. But it seems to me that some of the statements on that page are not entirely correct.

The building in New York was, as the published minutes of the Common Council of the city show, built by the city between 1752 and 1754 and was standing until 1799. Not once in those minutes was the building called the *Royal* Exchange. There are reports of the sittings of the Supreme Court in the *New York Daily Advertiser, New York Journal, Gazette of the United States, Federal Gazette, Pennsylvania Gazette* and *Pennsylvania Packet*. In none of those accounts is the building called the *Royal* Exchange. Your illustration was from a drawing in the Emmet Collection in the New York Public Library. It does not call the building the *Royal* Exchange. Indeed, it would have been strange if a building owned by the City of New York and used by the Supreme Court of the United States and the House of Assembly of New York had been called the *Royal* Exchange nearly a decade after the close of the Revolutionary War. The building was known to contemporaries as "the Exchange," not "the *Royal* Exchange."

We are then told that the "third term of Supreme Court was held in the City Hall (also called Congress Hall) in Philadelphia." The only known contemporary account which tells where the Supreme Court sat appears in the Burd Papers. In that account Edward Burd said that the Supreme Court sat in the State House. Burd was prothonotary of the Supreme Court of Pennsylvania, candidates for admission to the federal court from that state called upon him to certify that they had been admitted to practice in the court of which he was prothonotary and he himself was admitted to the bar of the Supreme Court of the United States at that time. He was a thoroughly competent witness on the question and there is no conflicting testimony. His statement was that the sessions of the Supreme Court for February, 1791, were held in the Pennsylvania State House.

In later terms the Court unquestionably sat in the City Hall, at Fifth and Chestnut Streets; but that building was not also called Congress Hall, for the contemporary accounts show conclusively that the sessions of Congress were held a block away, at Sixth and Chestnut Streets.

First Room Occupied in Capitol

As to the first room occupied by the Court in the Capitol at Washington, there have been some recent accounts which say that it was on the present main floor of the Capitol; but those accounts appear to be incorrect. The journals of Congress for January 21 and 23, 1801, show that Congress authorized the use of one of the committee rooms on the first floor of the Capitol. At that time the first floor was the ground floor. (See *National Intelligencer*, August 26, 1847, p. 3, col. 5). In the Fine Arts Division of the Library of Congress is a ground floor plan of the Capitol which was given to B. H. Latrobe, the new architect of the building, in May, 1803. According to penciled notations on that plan the Court was using a room on the western side of the ground floor. Latrobe wrote letters to President Jefferson on August 31, 1805 and on September 2, 1807, in each of which he furnished sketches which showed that the courtroom was so located. The Court never sat in the small room which is now the office of the Senate sergeant-at-arms.

The only evidence that after the Capitol was burned

*See further Mr. Reeder's paper in the Proceedings of the American Philosophical Society, vol. 76, no. 4, 1936, pages 543-96, entitled "The First Homes of the Supreme Court of the United States."

The Constitution Today

(*Continued from page* 367)

democracy is practically gone. What I am saying is fundamental. I am talking about things that are fundamental, vital things, as important to me and to you as the love for liberty. I am not talking about anyone, I am talking about a situation; I am talking about the result of the operation of the laws of cause and effect.

Preservation of Democracy

As it was the responsibility of our people 150 years ago to establish the Federal organization, in just as definite a sense it is our responsibility to preserve this democracy, not only for the sake of the democracy but for the sake of the Federal organization as well. There can be but one end to a policy of continuing to weaken the structure of the underlying States and at the same time continuing to increase the Federal overload.

This is not a partisan matter; it is not a sectional matter; it is not that of any department. None are free from responsibility. It is the concern and business of all the people, of all the parties, and of all the officials of all the departments of government, Federal and State.

Whether you agree with me or not, I hope that what I have said will be received in the spirit in which it is spoken, and that it will be provocative of thought and of an examination of the facts.

You and I are in responsibility at the high peak of human history, charged with a duty different from that which Madison confronted, different from that which Marshall confronted. They and the statesmen of that time were confronted with the responsibility of helping to hold these States together until they could grow together and form a nation. It was their business to preserve this Nation. It is our business to preserve this democracy.

No greater challenge ever came to any people of any age than the challenge which comes to you and me at this time. It is well for us on this, the one hundred and fiftieth anniversary of the inauguration of the Supreme Court, celebrating as we do a great event in the history of our Government, to be conscious of the fact that we are in responsibility at a time when deliberate persons of sound judgment are deeply concerned for the future of this country. Only a people humbled by the sense of great responsibility, earnestly desiring to know the truth, candid enough to face it, whatever it may be, and courageous enough to do what duty requires, whatever the sacrifice, can make certain the preservation of this democracy.

Harris & Ewing

ROBERT P. REEDER

by the British the Court sat in the home of its clerk, Elias Boudinot Caldwell, on Pennsylvania Avenue S.E., consists of a statement made by his granddaughter eighty years later. (American Monthly Magazine, III, 166; Records of Columbia Historical Society, XXIV, 209, 211). On the other hand contemporaries said that the Court sat in a house south of the Old Capitol (Hillard, *Memoir and Correspondence of Jeremiah Mason*, 145), which, as Congress was then occupying temporary quarters elsewhere, meant simply the present Capitol before enlargement. Such a house, on New Jersey Avenue near B Street Southeast, was owned by Daniel Carroll; and there is at the General Accounting Office in Treasury Account 33792 of Washington Boyd, United States marshal for the District of Columbia, a receipt given to him by Carroll on January 2, 1816, for $650 for "thirteen months house rent ending the 31st of December, 1815, for the use of the Supreme Court of the United States and the Circuit Court of the District of Columbia for the County of Washington at six hundred dollars per annum." The United States Government paid out money to Carroll because the Supreme Court was using his house and not Caldwell's.

While your illustrations are very interesting, it seems to me that some mistakes have crept into the accompanying text.

ROBERT P. REEDER.

Securities and Exchange Commission, Washington, D. C.

TO THE EDITOR:

In your February issue General MacChesney reviewed Professor Richard R. Powell's recent book on Torrens land registration, favorably to Professor Powell and unfavorably to land registration. Then he fired a few shots at an earlier review of Powell by Messrs. McDougal and Brabner-Smith in the *Yale Law Journal* (Volume 48, Page 1125). General MacChesney says:

> "I think it fair to say that those members of the bar handling most of the transactions involved in land transfer would agree with the conclusions reached by Professor Powell."

I protest and dissent. I have a right to speak, for I have devoted a lifetime to conveyancing practice in that one of the States of our American union which has complete success and satisfaction with the Torrens system.

One of General MacChesney's chief points is that there has been no great public demand for the Torrens system. In Massachusetts the contrary is true. Not long ago, in the May, 1939 issue of the National Real Estate Journal, I published an article showing our forty years' success and was justified in writing that in Massachusetts

> "anyone who proposed to repeal any part of the law or to cut down in any way the jurisdiction of the Land Court would be regarded as ludicrous in his absurdity and lunatic in his proposal."

I will supply off-prints of that article to anyone.

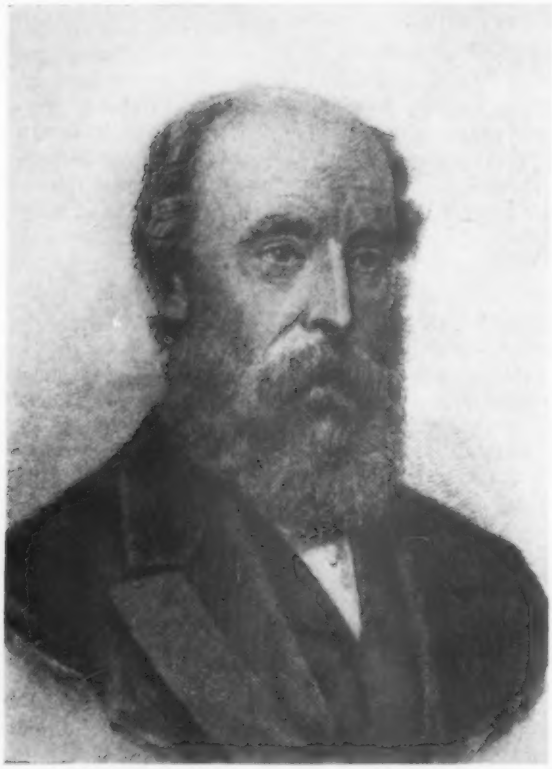
Professor McDougal and Professor Brabner-Smith challenge Professor Powell's reasoning, based upon something which General MacChesney assumes to be "the facts." I go further and challenge Professor Powell's "facts." I have submitted my specifications of this challenge to Professor Powell's employers with copy to him. Before anyone commits General MacChesney's mistake of assuming Professor Powell's version to be reliable, he would do well, as to Massachusetts, to consult members of the Massachusetts bar who favor and use land registration. The story he hears from us will give good ground for my suggestion that in other States there is probably a like gap between the whole truth and Professor Powell's version.

Briefly, I may sum up my difference with Professor Powell by using his own phrase:

> "He began," says he, "to waver under the impact of accumulating facts adverse to land registration."

Now I say that when that happened it was his duty to his employers to seek out and accumulate facts favorable to land registration and to apply the acid test to his collection of "facts." But, did he expose himself to impact from that side? Anyone who is interested enough to accept both Professor Powell's assistance and my own in looking into the story of our gorgeous success in Massachusetts will, in my opinion, be astounded by the difference between the stuff that General MacChesney relied upon and the good story we have to tell in Massachusetts. Such an inquiry should be the first step in each other State which envies us our success and wants to copy it.

Boston. RICHARD W. HALE.



SIR ROBERT TORRENS—1814-1884
Premier of South Australia who developed the system of land registration since called by his name. (Picture from Arthur W. Jose, *History of Australasia*, Sydney: Angus & Robertson, 1911).

Chairman Freer's Address

(*Continued from page 343*)

Findings

In our hypothetical case there has been but one issue of fact and one issue of law raised. If the Commission is satisfied from the entire record of the proceeding that the respondents have acted pursuant to agreement or understanding it will very probably issue an order to cease and desist since such action to cut off the source of supply of a competitor is clearly an unfair method of competition. On the other hand, if it is not satisfied that an allegation of agreement or understanding has been proved, it will order that the complaint be dismissed.

In the event the Commission decides upon the entire public record after considering the briefs and oral argument, that the activities have been carried out pursuant to agreement or understanding, it will direct the trial examiner to prepare and submit to it, tentative draft of findings of fact. The draft of findings prepared by the trial examiner pursuant to the Commission's instruction is then carefully reviewed and frequently revised by the Commission and an order to cease and desist based thereon is prepared. Thereupon, both findings of fact and order are served upon the respondents.

Nature and Enforcement of Orders

As stated previously, orders of the Commission direct respondents to cease and desist from a practice considered unlawful. These orders are preventive rather than punitive. The Commission has no authority to impose any penalties whatsoever upon a respondent. . . .

The Commission has fared exceedingly well, particularly in recent years, in actions in the courts to review its orders.

Nominating Petitions

ARKANSAS

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate C. T. Cotham, of Hot Springs, for the office of State Delegate for and from the State of Arkansas for the vacancy now existing:

Jeff Davis, John A. O'Connor, Jr., William E. Patterson, J. R. Wilson, George M. LeCroy, and S. E. Gilliam, of El Dorado.

E. H. Wootton, T. K. Martin, Leland F. Leatherman, Clyde H. Brown, Sidney S. McMath, Richard M. Ryan, Bessie N. Florence, Earl Witt, Samuel W. Garratt, and Earl J. Lane, of Hot Springs.

Joe C. Barrett, Archer Wheatley, N. F. Lamb, Arthur L. Adams, Chas. D. Frierson, and Chas. Frierson, Jr., of Jonesboro.

Howard Cockrill, Thomas R. Vaughan, Frank J. Wills, Terrell Marshall, C. Ashley Cockrill, and John D. Newman, of Little Rock.

Frank S. Quinn, Chas. C. Wine, H. M. Barney, A. G. Sanderson, Jr., W. H. Arnold, Richard L. Arnold, T. B. Vance, William H. Arnold, Jr., and A. P. Steel, of Texarkana.

The same persons named herein, and Verne McMillin and Graham R. Hall of Little Rock, also nominate C. T. Cotham for the office of State Delegate for and from the State of Arkansas, for the regular three-year term to begin at the adjournment of the 1940 Annual Meeting.

DELAWARE

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate James R. Morford, of Wilmington, for the office of State Delegate for and from the State of Delaware, to be elected in 1940 for the vacancy now existing and for the regular three-year term:

Clarence A. Southerland, Paul Leahy, David F. Anderson, E. Ennalls Berl, Harold B. Howard, Joseph S. Wilson, William Prickett, Harry W. Lunger, John J. DeLuca, H. Albert Young, J. Rankin Davis, Herbert H. Ward, Jr., Stewart Lynch, Joseph A. L. Errigo, Anthony F. Emory, Clair J. Killoran, Robt. H. Richards, Daniel O. Hastings, Ayres J. Stockly, Daniel F. Wolcott, S. Lester Levy, W. S. Potter, Thomas Herlihy, Jr., Joseph Donald Craven, S. Samuel Arsht, Edwin D. Steel, Jr., Wm. H. Foulk, William Marvel, Josiah Marvel, Jr., and Sybil U. Ward, of Wilmington.

GEORGIA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Arthur G. Powell, of Atlanta, for the office of State Delegate for and from the State of Georgia, to be elected in 1940:

Walter H. Burt and Sam S. Bennet, of Albany.

John M. Slaton, Augustus M. Roan, Max F. Goldstein, James N. Frazer, James K. Rankin, Burket D. Murphy, Blair Foster, Philip H. Alston, Jr., Philip H. Alston, William B. Spann, Jr., Robert P. Jones, Robt. T. Jones, Jr., Elbert P. Tuttle, Joseph B. Brennan, Herbert R. Elsas, Randolph W. Thrower, W. A. Sutherland, Douglas W. Matthews, Herbert J. Haas, James G. Kenan, Robt. H. Jones, Jr., A. W. Clapp, Edgar Watkins, Charles T. Winship, Hamilton Douglas, Scott Hogg, Andrew A. Baumstark, Thos. Howell

(*Continued on page 372*)

TO THE EDITOR:

RE the article of a good friend of mine in the January number on "An Account of an Unidentified Congress of Comparative Law," I desire to call attention to the erroneous impression that would be created in the reader's mind as to the Congress of 1937. The learned author of the skit was entitled to his humorous and sarcastic comments (although it would seem that international good will is not likely to be promoted by making fun of foreigners' ways of eating and dressing). Moreover, as a description of the facts of the First Congress in 1932, the article is substantially correct. But as a description of the Second Congress, in 1937, it is wholly incorrect. At that Second Congress, all of the defects of administration that had occurred at the First Congress were corrected. For example, to facilitate registration of Americans, a committee of five Americans (including two handsome young women volunteers) conducted a separate registration table with ample information service and without the slightest delay for any American delegate. The same was true of other details, as can be testified to by Phanor Eder of New York and a dozen other Americans who took an active part in the various sections.

I may add that the author of the skit was present as a delegate at the First Congress in 1932, but was *not* present as a delegate in the 1937 Congress.

In order that the record may be correct, and that the readers of this JOURNAL may not be discouraged from attending future Congresses, I will ask you to give space to this letter.

JOHN H. WIGMORE

Chicago.

INTERNATIONAL LAW CONFERENCE AT THE HAGUE, 1937

TO THE EDITOR:

I WAS interested to note the comment of Mr. Clifford A. Wilson in the Letter Department of the February, 1940 issue of the JOURNAL that the correct title of the picture called "The Country Lawyer" in the January issue is "A Flaw in the Title."

I have had on my wall for a number of years a picture actually labelled "Flaw in the Title" which apparently represents a scene in an office of a Justice of the Peace of about the style and vintage of "The Country Lawyer." However, the interesting part of my picture is that while the "persons" therein are in human postures, they are all definitely simian in appearance. A male and female are being questioned by one of a group about the counsel table, while the J. P., if such he is, is in the background. Bailiffs and court loungers are in evidence, and the scales of justice are lying on the floor in the foreground.

Although I have heard many interesting speculations on the allegory portrayed, I have never heard a satisfactory one. I wonder if you or some of the JOURNAL subscribers are familiar with this picture and can advise me of its meaning. It would satisfy a long felt curiosity!

Phoenix, Ariz.

FRANCIS M. SASSÉ

THE National Broadcasting Company has extended its facilities to the American Bar Association's Committee on Criminal Justice—Youth for a series of thirteen broadcasts on youth in crime, starting March 4. The Committee is following the usual procedure in presenting its final recommendations in the form of model acts as amended by the Council, before the Institute's regular meeting in Washington next May. The broadcasts have been arranged so that the first ten—preceding the conference—illustrate America's crime problem among youth. The last three programs, which follow the May meeting, will outline in detail the new proposal as approved.

"YOUTH IN THE TOILS" will be broadcast over WJZ in New York, and the program has been offered by NBC to over a hundred other stations on its Blue Network. If members would like to hear the series over their local Blue Network station, it is suggested that they let the station manager know of their interest.

Bill of Rights—Statement by Committee of Association

ON March 1 the following public statement was issued by the special Committee on the Bill of Rights of the American Bar Association, with the approval of the Board of Governors of the Association:

World events are bringing the people of America to the realization that the freedom which we enjoy has disappeared in a large part of the world. These events have fortunately brought about a new concern for the safeguarding of American liberties and institutions. On the other hand, they have also produced new tensions and intolerances. It is an opportune time to remind the legal profession and the general public to be on their guard against the impairment of any of the basic rights of Americans.

Whether threats to traditional American liberties proceed from the "Right" or the "Left" makes no difference. Whether they consist of illegal efforts to suppress the expression of orthodox opinions or of radical and unpopular opinions makes no difference. Whether they consist of illegal attempts to coerce workers to join unions or not to join them makes no difference. *All* tendencies to violate civil rights should be equally discountenanced at *all* times but especially in the present critical period.

Illegal violence in any circumstances, even against activities deemed subversive, cannot be justified upon grounds of supposed necessity. Orderly methods exist under our Constitution and laws which are fully adequate to protect our institutions and the legitimate interests of all groups.

In other lands, even apart from war conditions, countless millions are no longer secure in their persons, property and homes, nor are they free to assemble and discuss openly their social and political problems. In America, these personal rights are constitutionally guaranteed, including the right to voice our thoughts on public questions. It is vital to liberty that the most unpopular be given the opportunity to speak. When we deny this right, especially by violence, we are using the very methods of dictatorship and tyranny that we abhor. Chief Justice Hughes, in his presidential address to the American Bar Association in 1925, said: "We should be especially on our guard against varieties of a false Americanism which profess to maintain American institutions while dethroning American ideals."

There is no place in this country for mob rule. Individual liberty cannot long endure in a society which allows violence to supersede the law.

We call upon the members of the legal profession, all public officials and the public generally to set their faces against all illegal methods to suppress discussion or otherwise to violate constitutional rights.

Nominating Petitions

(*Continued from page* 370)

Scott, J. L. Riley, Walter McElreath, John S. Matthews, G. Seals Aiken, Blewett Lee, T. G. Woolford, Marion Smith, Julian E. Gortatowsky, Louis Regenstein, Jr., Ed Smith, Jr., M. E. Kilpatrick, D. F. McClatchey, Edward W. Smith, Henry B. Troutman, Robert S. Sams, Dan MacDougald, T. M. Smith, Alex W. Smith, Houston White, David Gershon, W. Colquitt Carter, Grover Middlebrooks, Shepard Bryan, Harry L. Greene, Edgar A. Neely, Jr., James A. Branch, Hamilton Lokey, E. Clem Powers, John L. Tye, Jr., R. A. Edmondson, Jr., Reuben A. Garland, Zach Arnold, Saml. C. Atkinson, Charles S. Reid, John A. Boykin, B. F. Woodruff, J. Prince Webster, F. M. Bird, and E. Smythe Gambrell, of Atlanta.

H. Abit Nix, of Athens.

Joseph B. Cumming, Bryan Cumming, and James S. Bussey, of Augusta.

William Butt, of Blue Ridge.

J. D. Gardner, of Camilla.

Willis Battle, W. H. Young, Jr., A. Edward Smith, J. Q. Davidson, Clifford J. Swift, Jr., and H. H. Swift, of Columbus.

Charles M. Tyson, of Darien.

B. G. Oberry, of Douglas.

Leonard LaConte, of Elberton.

Fred L. Brewer and Boyd Sloan, of Gainesville.

W. W. Abbott, Jr., of Louisville.

Hoyt H. Whelchel, of Moultrie.

Leon Covington and Barry Wright, of Rome.

Thomas W. Hardwick, of Sandersville.

John Rourke, Jr., Edward C. Brennan, Henry B. Brennan, William L. Clay, W. Leon Freidman, Jacob Gazan, Adele May, Julian F. Corish, J. P. Houlihan, Jr., Elizabeth M. Fitch, George O'Donnell, A. R. Lawton, Jr., T. M. Cunningham, W. W. Douglas, Anton P. Wright, J. Randolph Anderson, H. Wiley Johnson, and O. E. Bright ,of Savannah.

J. Dorsey Blalock, of Waycross.

NEVADA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Chas. A. Cantwell, of Reno, for the office of State Delegate for and from the State of Nevada, to be elected in 1940:

George S. Brown, John S. Belford, L. D. Summerfield, A. R. Schindler, W. M. Gardiner, Harlan L. Heward, Charles M. Merrill, Felice Cohn, H. R. Cooke, Wm. McKnight, Ernest S. Brown, Grant L. Bowen, Sidney W. Robinson, Samuel Platt, Wm. Woodburn, Jr., Douglas A. Busey, Lloyd V. Smith, Myron R. Adams, J. T. Rutherford, R. K. Wittenberg, Miles N. Pike, Bruce R. Thompson, George Springmeyer, Joseph P. Haller, Wm. J. Forman, Leon Shore, I. A. Lougaris, Kendrick Johnson, E. Frandsen Loomis, and Thomas H. Grim, of Reno.

NEW HAMPSHIRE

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Conrad E. Snow of Rochester, for the office of State Delegate for and from the State of New Hampshire, to be elected in 1940:

Benjamin H. Bragg, of Alstead.

Warren W. James, of Berlin.

Francis W. Johnston, of Claremont.

Amos N. Blandin, Jr., Benjamin W. Couch, Allen Hollis, Carl C. Jones, Harry F. Lake, Thomas L. Marble, Alexander Murchie, Robert C. Murchie, Jennie Blanche Newhall, Elwin L. Page, Robert W. Upton, of Concord.

Frank R. Kenison, of Conway.

Charles F. Hartnett, of Dover.

John Scammon, of Exeter.

James P. Richardson, of Hanover.

John E. Allen, Orville E. Cain, Chester B. Jordan, of Keene.

Thomas P. Cheney, William S. Lord, Arthur H. Nighswander, Fortunat E. Normandin, of Laconia.

Fred C. Cleaveland, George F. Morris, of Lancaster.

Oliver W. Branch, Peter Woodbury, of Manchester.

George M. French, Robert B. Hamblett, of Nashua.

Jesse M. Barton, of Newport.

Preston B. Smart, of Ossipee.

Charles M. Dale, Ralph G. McCarthy, Arthur E. Sewall, Jeremy R. Waldron, of Portsmouth.

Burt R. Cooper, Justin A. Emery, Gardner S. Hall, of Rochester.

Edgar M. Bowker, of Whitefield.

William J. Britton, of Wolfeboro.

Harold K. Davison, of Woodsville.

NEW HAMPSHIRE

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Louis E. Wyman, of Manchester, for

(*Continued on page* 380)

News of the Bar Associations

West Virginia Bar Association

THE West Virginia Bar Association is taking a strong stand in favor of the adoption of the proposed judiciary amendment to the State Constitution, the chief features of which are the substitution of summary courts of record for justices of the peace and provision for the increase in the number of circuit court judges by the Legislature in proportion to population in the respective judicial circuits as determined by the latest official census of the United States. This judiciary amendment will be voted upon by the people of West Virginia at the next general election in November, 1940.

The Association has also unanimously adopted a resolution favoring the enactment by Congress of the identical so-called administrative law bills now pending in the Senate and House of Representatives of Congress designated, respectively, S. 915 and H. R. 6324, 76th Congress, and entitled "A Bill to provide for a more expeditious settlement of disputes with the United States, and for other purposes," and originally sponsored by the late Senator Logan of Kentucky and Congressman Francis E. Walter of Pennsylvania. The legislation, designed to provide for judicial review of the rules and regulations of administrative agencies and to curb some of the present practices of administrative agencies of government in conducting hearings and making findings, has been approved by the American Bar Association, and prior to the favorable vote at the Clarksburg sessions of the West Virginia Bar Association the proposed legislation was fully explained to the convention by Colonel O. R. McGuire, who is chairman of the Special Committee on Administrative Law of the American Bar Association.

Ashton File, of Beckley, was elected President of the Association in the annual election conducted at its last annual meeting, Sept. 29-30, 1939. Mr. File has been actively engaged in Association work for many years and served as the Chairman of the Executive Council during the past year.

ASHTON FILE
President, West Virginia Bar Association

The Twentieth Anniversary of the Federal Bar Association

SIX hundred members and guests of the Federal Bar Association attended a dinner at the Mayflower Hotel in Washington on Jan. 20, 1940, in commemoration of the twentieth anniversary of the founding of that Association.

The President, William N. Morrell, delivered the address of welcome and paid tribute to the vision and the zeal of the founders. He also read messages from the White House, the President of the American Bar Association, high public officials and prominent citizens.

A distinguished company gathered for the occasion. It included Associate Justice Harlan Fiske Stone of the Supreme Court of the United States as guest of honor, the Honorable Robert H. Jackson, Attorney General of the United States, as guest speaker, many members of the Federal Judiciary, several United States Senators and Representatives, distinguished public officials, and representatives of the American Bar Association and several local Bar Associations.

Henry I. Quinn, a member of the bar of the District of Columbia, representing the American Bar Association, urged continued cooperation of the two Associations in perfecting pending legislation relating to Federal administrative tribunals.

Delivering his first public address as Attorney General of the United States, Mr. Jackson declared that the Government lawyer must be the guardian of the public welfare, but warned that "a lawyer's standard includes not only zeal to protect the interests of the Government but also respect for the legitimate rights of adversaries," adding that "Government does not lose any case if by its result justice is done."

Oregon State Bar

A COMMITTEE, representing the Oregon State Bar and the City Club of Portland, is studying various proposals for a state department of justice for Oregon, similar to the federal department of justice. The committee says:

"In order that any proposals recommended by the committee may be workable and sound, the committee is asking the cooperation of certain key citizens and officials of other states in considering various aspects of the problem. Will you please answer the enclosed questionnaire and give us the benefit of any comments or suggestions you may care to make? The questions are intended to cover every conceivabe type of law and are based on the Uniform State Department of Justice Act, drafted by a committee of the National Conference of Commissioners on Uniform State Laws.

"In August, 1934, the American Bar Association recommended the creation in each state of a state department of justice, the head of which should direct and supervise actively the work of every district attorney, sheriff and law enforcement agency. Proponents state that there is a growing movement for centralization of authority, to meet the challenge of the modern criminal in his high-speed automobile or airplane; that local enforcement agencies, limited in jurisdiction, funds and personnel and faced with local burdens, generally have proved inadequate to meet this challenge.

"They point to the federal department of justice as a model of efficiency, economy and intelligent coordination. They point out that its head, the Attorney General of the United States, appointed by the president, not only has important duties as to civil matters, but also directs the prosecution of offenses under the federal criminal laws throughout the country, through the local United States attorneys; supervises the work of the United States marshals, the federal bureau of investigation, the federal bureau of prisons and the federal probation and parole system; and has made available to him the facilities of the

United States Public Health Service and other agencies.

"Today, eight states have state departments of justice, similar to the federal department: California, Iowa, Louisiana, Nebraska, New Mexico, Pennsylvania, Rhode Island and South Dakota. On November 8, 1938, North Carolina adopted a constitutional amendment authorizing such a department. Many other states have one or more features of the proposed unified system. Should Oregon make this change?"

Memphis and Shelby County Bar Association

THE Memphis and Shelby County Bar Association, with a membership of approximately 400 lawyers, has been quite active for the past several years.

The Association, together with other Associations throughout the state, secured the passage of an Act by the Tennessee Legislature defining the practice of law and making it unlawful for any unlicensed person to engage in the practice of law. Several lay agencies were enjoined from practicing law. Others have discontinued unauthorized Acts and there is now very good co-operation between Trust Companies, other Fiduciaries and the Bar Association. The committee on unlawful practice conducted a vigorous and successful campaign against concerns conducting the so called 'Lawyers' Listings" which a few years ago had all but reached the proportions of a racket.

Due to the vigilance of committees on discipline and ethics the public is beginning to appreciate the fact that the Bar Association will not condone or

(*Continued on page 376*)

International Law Meeting

(*Continued from page 339*)

English speaking provinces of Canada has a common origin with the laws applied in our . . . states. Presumably, therefore, there is a minimum of difference between them. However, the laws of Quebec and those of the Latin-American countries trace their origin back to the Code Napoleon and the Roman Law and very substantial differences are likely to exist.

"The Bar Association has done marvelous work in integrating and unifying the commercial law that is effective in our several states. It is decidedly appropriate that it should now endeavor to develop a similar degree of uniformity through the two western continents.

"I am sure that the House of Delegates is aware of the difficulties that will be encountered in gaining this objective. The nations and provinces involved are almost as numerous as those within our own Federal area and those nations take great pride in a system of law whose antecedents are much older than those of the system we follow. Success in the venture must be predicated on a realization by all parties of the importance of the objective that is sought and an open-minded desire to secure a code that will represent the very best practices regardless of whether they originate in American or in Roman jurisprudence, or whether they constitute entirely new invention.

"I presume that the study will involve a reconsideration of the uniform laws of sales, contracts and promissory notes. I hope that consideration will also be given to the importance of procuring uniformity of doctrine with respect to conflict of laws."

There will also be a discussion during the meeting concerning the following resolutions adopted by the House:

"WHEREAS, The overlapping jurisdiction of the United States and foreign countries to impose inheritance and estate taxes frequently results in the imposition on the estates of American citizens engaged in business, or owning property in foreign countries, of taxes which in the aggregate exhaust or almost exhaust the business or property subject to such double taxation:

"*Resolved*, That the American Bar Association recommend to the Congress of the United States that the application of the principle of eliminating international double inheritance and estate taxes be reciprocally arranged, either by legislation or by treaties, between the United States and foreign countries."

* * * * * *

"WHEREAS, The American Bar Association, at its meeting in Cleveland, Ohio, July 25-27, 1938, took cognizance of the fact that relief from international double taxation is an essential part of the program for encouraging foreign trade and helping American enterprises to compete in foreign markets; and

"WHEREAS, The Development of trade with countries of Latin America is of special interest:

"*Resolved*, That the American Bar Association recommend to the Department of State of the United States of America that it take whatever steps are necessary to include the prevention of international double taxation in the agenda of any special Pan-American Conference dealing with cognate matters which may be called pursuant to the objectives of the general Pan-American Conference held at Lima, Peru, in December 1938."

* * * * * *

"RESOLVED, That the American Bar Association endorses in principle the organization of an INSTITUTE OF COMPARATIVE LAW FOR THE AMERICAS, either as an independent institution or as a separate division of the American Institute of International Law, and invites the bar associations of all the other countries of the Western Hemisphere to cooperate in the organization and establishment of such an Institute; and refers the subject back to the Section for further study and submission of a report, at the next annual meeting of the Association, on how it should be financed, how the membership should be constituted, and on other questions concerning a more definite statement of its organization."

President Charles A. Beardsley will address the meeting, and in view of his interest in international affairs and the present international situation, his remarks will have special significance. Arrangements for the meeting are in charge of a committee under the chairmanship of Wilbur L. Gray of Washington, D. C., who is also Secretary of the Bar Association of the District of Columbia. He will be assisted by an experienced committee which has made these spring meetings unusually interesting and particularly well attended. Reservations should be forwarded to Howard S. LeRoy, Treasurer of the Committee, Colorado Bldg., Washington, D. C.

WILLIAM ROY VALLANCE
Chairman, Section of
International and Comparative Law

F. M. HENDERSON
President, Memphis and Shelby County Bar Association

(*Continued from page 375*)

palliate unethical and unfair dealings or conduct by its members and that it will receive protection against such treatment or conduct. This has had a very wholesome effect on the relationship between the Bar and the public and a tendency to increase respect for and confidence in the Association and its members.

The Association is sponsoring a series of lecture courses for lawyers. Subjects of general interest are selected. Two lectures were given on February 5, one on the new Bankruptcy Act by Hon. Walter Chandler, author of the Act and a Memphis lawyer, and one on Due Process of law as related to Inheritance Tax Laws by Hon. Edwin C. Hunt of the Nashville Bar.

F. M. HENDERSON President

Ramsey County Bar Association
St. Paul, Minnesota

THE Ramsey County Bar Association has recently been engaged in a number of projects which have not yet been brought to a conclusion but which seem to promise beneficial results.

Through two special committees appointed for the purpose, the Association has been conferring with members of the Ramsey County District Court with a view to revising the rules of practice of that Court in two particulars. One relates to the holding of Special Terms. The other and more far-reaching looks toward the introduction for the first time in this county of pre-trial procedure similar in scope and purpose to that provided for by Rule 16 of the Federal Rules of Civil Procedure.

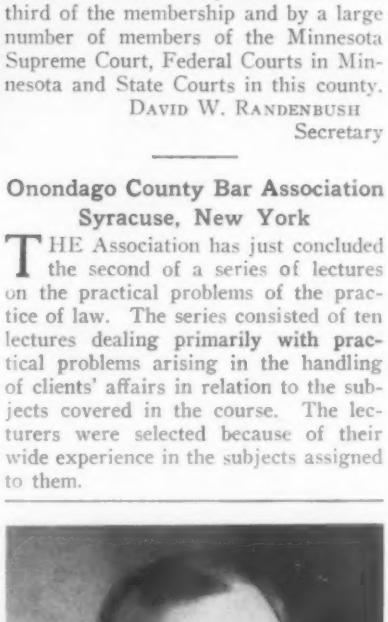
Another current activity of importance, which the Association is conducting through its Committee on Bar Publicity, is the development of a sound program for the fostering of public relations. While the immediate project under consideration is the publication in the newspapers of a series of statements designed to illustrate the value to the lay public of preventative legal services, the Committee also has under consideration the subject of neighborhood law offices.

On the purely social side, this Association conducted a highly successful Christmas party last December 23rd, which was attended by more than one-third of the membership and by a large number of members of the Minnesota Supreme Court, Federal Courts in Minnesota and State Courts in this county.

DAVID W. RANDENBUSH
Secretary

Onondago County Bar Association
Syracuse, New York

THE Association has just concluded the second of a series of lectures on the practical problems of the practice of law. The series consisted of ten lectures dealing primarily with practical problems arising in the handling of clients' affairs in relation to the subjects covered in the course. The lecturers were selected because of their wide experience in the subjects assigned to them.



Russell Smith

JOHN E. LUTTRELL
President, Oklahoma Bar Association

The Akron Bar Association

THE current year of the Akron Bar Association ended the first Saturday in March. The association functions through twelve standing committees, which committees during the course of a year perform a great deal of work. The more important matters which have been handled to completion during the current year are as follows:

Court Reorganization

First, reorganization of the Akron Municipal Court. In December, 1938, the Bar Association, through the committee on Judiciary and Legal Reform, made a comprehensive survey of the business of the Akron Muncipal Court. Based upon the facts disclosed by that survey, the Committee prepared and submitted to the Legislature a bill proposing numerous changes, the most important of which were the reduction of the number of judges from five to four, the creation of an elected presiding judge, the reduction of judicial salaries from $6,000 to $5,400 for the Presiding Judge and $4,800 for the remaining judges, the reduction of the number of bailiffs from 16 to 10, and numerous salary changes.

The officers and committees of the Association actively lobbied for the passage of this bill and secured its passage with some minor changes, the act becoming effective in August of 1939.

Thereafter the committee met and started a survey of the business of the Court, particularly with reference to the criminal branch, commonly known as the Police Court, and made numerous recommendations with reference to criminal bonds, parole and suspension of sentences and speedy disposition of cases, particularly jury trials. As a result of the recommendations of the Committee, the Judges have revamped their rules of court in accordance with the suggestions of the Committee, and have requested the City Council to provide for two jury commissioners to put the selection of juries in the Municipal Court on substantially the same basis as it is in our Common Pleas Courts. We believe that this ordinance will become effective within the next thirty days.

Second, during the past year, we have conducted our usual referendum upon judicial candidates in connection with the election of two Judges of the Municipal Court. Under our system, we do not endorse specific candidates, but by mail referendum determine the opinion of the Bar as to whether or not each individual candidate is or is not qualified.

Economic Survey of the Bar

Third, a special committee of the Association, upon the recommendation of the Executive Committee, conducted

an economic survey of the local bar along the lines outlined in the manual published by the American Bar Association. Approximately 520 questionnaires were mailed to members of the Bar in Summit County, Ohio, and 221 replies were tabulated in a compiled report, which, in our opinion, contains very valuable information, a copy of which has already been sent to the appropriate committee of the American Bar Association.

Fourth, the Public Relations committee has made a very active and determined effort to improve our publicity contacts with the public. This has largely taken the form of an effort to improve relations with the Akron Beacon Journal which is the only daily newspaper printed in Akron. The officers and members of the Public Relations Committee have had several informal conferences with the editorial staff of the newspaper and have succeeded in solving several difficult problems, the representatives of each institution more fully appreciating the viewpoint of the other.

Public Relations

We have also employed a Public Relations representative upon a part-time basis, and I believe we have had some valuable improvement in this connection as a result of his efforts and experience. This employment was upon an experimental basis only and terminates shortly. Whether or not it will be renewed, depends upon further action of the Association.

The Committee on Unauthorized Practice has been very active and has handled a number of matters not involving any new problems. Their most interesting contribution to the work of the Association has been the formulation of a resolution thereafter adopted by the Association which declared unethical the practice of carrying the names of deceased partners in firm names more than two years after the death of the particular member. Shortly after the adoption of this resolution, several leading firms changed their firm names to comply with the resolution.

There have been, of course, many other interesting and valuable things accomplished by our various committees, but I believe the foregoing constitute those which are of most interest.

James Olds,
President.

Cleveland Bar Association and Life Underwriters

THE Cleveland Bar Association and The Cleveland Life Underwriters Association have joined in this Statement of Principles in a joint effort to bring about better understanding and cooperation between members of the bar and life underwriters in the service of the public.

GEORGE C. GREEN
President, North Carolina State Bar

A standing committee, consisting of six members, shall be appointed, three by the Cleveland Bar Association and three by the Life Underwriters Association. If any vacancy occurs in said committee, or if a member thereof is unable to attend any meeting, the organization originally having appointed such member may designate another to substitute for him or to fill the vacancy on the committee, as the case may be. All questions raised either through the Bar Association or the Life Underwriters Association, relating to a breach of these principles, shall be referred to said committee for its recommendations thereon before action is taken by such association direct. The committee shall meet from time to time to discuss any such matters, to review the effects in operation of these principles, and to consider further extensions thereof. It is suggested that the work of this committee be reported from time to time in The Cleveland Bar Association Journal and in Life Lines (journal of The Cleveland Life Underwriters Association).

The principles which are to form the basis of cooperation between members of the bar and life underwriters are as follows:

1. Life underwriters should not attempt to practice law or to give legal advice, either directly or indirectly. Thus, it is improper for an underwriter to prepare, or give a legal opinion interpreting, any legal instrument, such as a will, living trust, contract, deed, assignment form for property, etc. Nothing in this paragraph, however, shall be understood as restricting the company represented by the life underwriter from preparing forms for use in connection with its own contracts.
2. (a) It is improper for a life underwriter to advise a client or prospect against employing a lawyer or against submitting any matter under consideration to a lawyer. On the contrary, whenever a legal question arises, the life underwriter should suggest that the client or prospect consult the latter's lawyer.
   (b) Likewise, a lawyer should suggest that a client seek the advice of a life underwriter on insurance problems upon which the lawyer may not be currently informed. Where a client brings to his lawyer a plan or idea suggested by an underwriter, it is the better practice for the lawyer to obtain the client's consent to discuss the plan or idea directly with the underwriter who suggested it, and to postpone his opinion and advice until such discussion is had.
   (c) When a lawyer is in the case, it is not improper, and it is urged, that the underwriter express to the lawyer his views freely on any matter under consideration and make any suggestions he chooses for the lawyer's consideration. The suggestions may frequently be of great value to the lawyer and, consequently, to the client or prospect. Whenever the underwriter's understanding of the law is contrary to the opinion of the lawyer, it is the better practice to resolve the question in a separate conference between the lawyer and the underwriter.
   (d) In other words, in their respective fields the life underwriter and the lawyer should complement one another, and only by their determined cooperation, with spirit of proper regard for the scope of training and experience of the other, will the interests of the public be best served.
3. Life underwriters should not furnish nor make specific recommendations of lawyers, unless requested by the client or prospect to do so, in which event it is the better practice to suggest a choice of lawyers. Lawyers should not seek to divert business from one life underwriter to another; nor should a lawyer recommend that insurance be taken or not taken with a particular life insur-

ance company, unless requested by the client to do so. In the event that a lawyer is asked to recommend an insurance company or underwriter, it is the better practice to suggest a choice thereof.

4. It is proper for an underwriter to retain counsel to help him in working out a case, and it is proper for a lawyer to render a legal opinion to a life underwriter when the same is requested by the life underwriter for his own use in a particular transaction, but such an opinion must not be circulated by the underwriter and should be so drafted by the lawyer as to appear on its face to apply only to the particular state of facts involved in said transaction so as to avoid its susceptibility of circulation.
5. It is improper for a lawyer to demand or accept any share in a life underwriter's commission from the sale of insurance, and it is equally improper for a life underwriter and a lawyer to divide a lawyer's fee.
6. The above principles are as applicable to a life underwriter who is himself admitted to the practice of law as to the general life underwriter.

The above Statement of Principles is designed for the assistance and guidance of the members of the bar and the life underwriters of Cleveland. It is not intended as a complete exposition of the matter dealt with and is subject to modification or expansion at any time in the future by proper action of the two associations which have joined in this declaration.

Bar Association of Dallas, Texas

IN December, 1939, the Bar Association of Dallas, in a beautiful and impressive ceremony, presented to the Court of Civil Appeals in and for the Fifth Supreme Judicial District of Texas, oil portraits of Chief Justice Joel R. Bond, Associate Justice Ben F. Looney and Associate Justice Towne Young, the present Justices of that Court. Presentation addresses on behalf of the Association were made by Judge J. C. Muse, Sr., Morris B. Harrell and Gabe P. Allen of this Bar, and the acceptance address on behalf of the Court was delivered by Judge Ben F. Looney.

In October, 1939, the Association conducted an extensive legal institute on "oil and gas." Lectures on various phases of the law in this field were delivered by Prof. A. W. Walker of the University of Texas Law School, by Angus Wynne, President of the Texas Bar Association, and by George M. Morris, tax attorney of Washington, D. C., Chairman of the Section on Taxation of the American Bar Association, who spoke on the subject, "Hidden Taxes in Oil and Gas Transactions." The institute was well attended by lawyers, not only from various sections of this state but also from other producing states, including Louisiana, Oklahoma, and Mississippi.

Pearle Portrait

PAUL CARRINGTON
President, Bar Association of Dallas, Texas

The Bar Association of Dallas is the originator of the legal clinic idea. The Bar meets in one of the District Court rooms every Saturday morning at 9:00 A. M., at which time some outstanding speaker addresses the meeting on some subject of interest. These meetings have been largely responsible for the membership's intensive interest in the Association and in its work, and have been responsible in a large measure for the success of the Association's program and for its splendid growth during the last few years. The addresses delivered at the weekly Legal Clinics are published each year in a permanently bound volume, entitled THE DALLAS BAR SPEAKS, a copy of which book is delivered free of charge to each member of the Association.

In line with the Association's experience that Bar parties tend to bring the lawyers closer together and help to maintain an interest in the Association and in its work, a number of splendid social events have been enjoyed during the past few months. Ladies are invited upon all such social occasions and there have always been several hundred in attendance.

On Jan. 29, 1940, at a large dinner dance at the Dallas Country Club, the newly elected officers for the year 1940 were installed, these being as follows: Paul Carrington, President, Nathaniel Jacks, First Vice-President, R. G. Scurry, Second Vice-President, Douglas E. Bergman, Third Vice-President, and T. J. Holcombe, Secretary and Treasurer.

The Association has had a full time executive secretary for some three years, at present Miss Oma Ervin, whose address is Dallas County Court House, Dallas, Texas.

J. GLENN TURNER

Los Angeles Bar Association

AT the January meeting the following resolution was adopted:

"Resolved, That the Board of Governors thanks the Los Angeles Bar Association first for its invitation to its dinner on the night of January 18, and second for a most delightful evening. The Board desires to congratulate sincerely the Los Angeles Bar Association and the Junior Barristers upon the work which they are doing. The Board believes the objects for which the State bar was organized can only be attained by the individual members of the bar working in unison. This can best be done through local bar associations, their work being coordinated through the State Bar. The work of the Junior Barristers and meetings such as the one of January 18 are certain to have a material effect in the ultimate improvement of the administration of justice."

Commenting upon the suggestion of a Chicago lawyer for a committee to study the problem of why local bar associations do not have more general support, the Los Angeles Bar Association Bulletin says:

Support of Local Bar Associations

"Los Angeles County has about half the number of lawyers listed in Chicago; but here, too, we have much the same situation, with half the lawyers having no bar association membership, and the other half affiliated with from one to three or four associations. Of course, we have an integrated bar in California, and payment of dues to it is compulsory, but aside from the State Bar there are five other local bar groups, in addition to the American Bar Association. Perhaps there is much food for thought in what the Chicago bar member suggests. There can be no doubt in the statement that if all lawyers would take enough interest in their profession to ally themselves with some bar group, the bar would be vastly benefited and the prestige of the profession would be immeasurably increased."

Commencing with the February issue, the Bulletin, through the efforts and cooperation of Sidney H. Wall, a member of the Junior Barristers Bulletin Committee, will present a "Digest of Recent

Decisions" of current interest to the Judiciary and Bar. Although particular attention will be given to decisions of the California Courts, it is the intention of the Bulletin Committee and of Mr. Wall to furnish, from time to time, Federal and "out of state" cases of more than usual interest and importance. The Bulletin Committee will welcome any comments which readers of the Bulletin may wish to make concerning the usefulness of this information and the mode and manner in which the case material can be most interestingly and advantageously presented.

The Bulletin also prints an article by Gilbert F. Nelson of the Beverly Hills Bar Association, on the subject "Should Adjudication of Incompetency or Insanity Terminate a Marriage?"

An Interesting View of a Lawyer's Whole Duty: Legal Hygiene

The principal article in the Bulletin is by Wendy Stewart, a member of the Los Angeles bar, the tenor of which may be learned from the following paragraphs:

"While the medical profession has for a considerable period engaged actively in a variety of ways in the development and application of the principles of preventive medicine, nothing comparable has been accomplished in the field of law.

"In the endeavor to formulate a similar line of action as applied to legal difficulties and their accompanying discomforts, the writer has for the comparatively brief period of the past seven years spent in practicing law, applied an interest in the preventive phases of medicine and mental hygiene to the consideration of the problems encountered. Each case has been considered not only from the standpoint of what was necessary for its immediate handling in order to yield the most satisfactory results for the client under the circumstances as they existed at the time at which it was presented, but also as a matter of private research from the standpoint of what different steps could have been taken earlier and at what different stages in the development of the difficulty up to the point at which an attorney's advice was being sought, which might have resulted in an avoidance of the difficulty entirely, or in placing the client in a more advantageous position than was in fact the case, as regards either his legal rights, or the availability of evidence with which to establish them.

"Out of this study emerge a great variety of hypotheses, a number of theories which are gradually taking shape and which may become more substantial by confirmation through an adequate number of repetitions of similar sets of facts followed by similar results; and two conclusions of the validity of which the writer is sufficiently certain to feel that they should form the basis of concrete recommendations."

New Officers Elected: Committee on Judicial Candidates

At the February meeting Herbert Freston was elected President; J. C. Macfarland, Senior Vice-President; George M. Breslin, Junior Vice-President. The Association amended its by-laws by changing the make-up of the Board of Trustees and also adopted an article on judicial candidates, Section 1 of which is as follows:

"Section 1. The Standing Committee on Judicial Candidates and Campaigns heretofore created under this section prior to this amendment shall be continued, the members thereof to hold office for the terms for which they were appointed. Upon the expiration of the term of each member, his successor shall be appointed for a period of six (6) years. Such appointment shall be made by an Appointing Board composed of the President of the Association, the ten (10) past presidents next in order who reside and practice law in the County of Los Angeles, and the Presidents of the Affiliated Associations as defined by Article VI of the By-Laws. The Appointing Board shall meet at the call of the President or of any three (3) members."

Law Library

The income of the Law Library for the last fiscal year was derived as follows:

Filing Fees 98.4%
Membership Fees 1.6%

No money raised by taxation is expended by the Law Library, but the County is directed by law (Pol. C. 4198) to furnish quarters.

Justice Edmunds of the Supreme Court of California recently told the Association that lawyers file too many briefs and too long.

Louisville Bar Association

UNDER the administration of Thomas A. Ballantine as President we have enjoyed an active and productive year. Most recently the annual Gridiron Dinner of the Louisville Bar Association was received by the Bar with great enthusiasm. The annual show was written by Charles W. Morris and, with a cast furnished by the Little Theatre group of the University of Louisville, provided an evening of hilarious entertainment for the three hundred members of the local Bar Association who attended the dinner, held Dec. 13, 1939.

The Bar Association has taken a great deal of interest in the work of the Statute Revision Commission, which is presently engaged in recodifying the statute law of Kentucky. A recent meeting with the members of the Commission, held in Louisville, was attended by a large group of the local Bar.

BALDWIN C. BURNAM
Secretary

The Association of the Bar of the City of New York

THE Special Committee on Junior Bar Activities, through its speakers' bureau, arranged for 62 speaking engagements during the fiscal year, the speakers being the younger members of the association who desired further training in public speaking. It is estimated that they spoke to over 12,000 in New York City and its suburbs. Some of the subjects were Bill of Rights and Civil Liberties, Relief, Recovery, Wages and Hours, Neutrality and Peace, Current and International Affairs, Freedom of the Press, Democracy, Benjamin Franklin and Legal Aid.

There can be little doubt that the Committee on Grievances occupies a prominent position throughout the nation in the consideration of charges of unprofessional conduct against members of the bar. The committee has the assistance of paid counsel, but the membership of the committee is, of course, voluntary. During the last fiscal year it considered 2,236 complaints against attorneys or persons alleged to be attorneys. 2,067 complaints were finally disposed of. 2,015 were dismissed as wholly without merit or unsupported by sufficient proof. Eleven lawyers were disbarred after trial before referees named by the Supreme Court. In addition seven were disbarred on certificates of conviction of felonies, six were disbarred on consent of the accused, five were suspended, and three were censured by the court. Expenditures by the association out of the treasury of the association by reason of the work of this committee during the fiscal year amounted to $39,427.97.

CHARLES H. STRONG
Secretary

Toledo Bar Association

THE Toledo Bar Association averages 350 members, including approximately 100 Junior Bar members. The Junior Bar members, while having no separate organization, engage to some extent in separate activities in which their members alone are interested. The Junior Bar members also

RICHARD D. LOGAN
President, Toledo Bar Association

engage in most joint activities with all members of our Association.

The activities of the Association include a golf tournament in the autumn, followed by a dinner; luncheon meetings approximately every two weeks, with a speaker or speakers on various legal and current interest topics; an annual Law Institute in the early Spring during the past seven years, the speakers including Roscoe Pound, Dean Goodrich of Pennsylvania, Prof. Bohlen of Pennsylvania, Prof. Scott of Harvard, and Dean Bates of Michigan. This winter the Association is giving a course of eleven lectures entitled "Preparation for Trial of a Law Suit." The speakers are able practitioners and judges. Each lecture is devoted to a particular phase of the Trial. On Feb. 9 and 10 of this year Professor W. Barton Leach of Harvard addressed our Law Institute on the subject of "The Drafting of Wills and Trusts."

Our standing committees include Grievance, Courts, Membership, Law Reform, Budget, Unauthorized Practice, Program, Municipal Courts, Public Relations, and Publicity.

We also have a Legal Aid Committee conducted by various secretaries of committees of the Association. The Committee furnishes free legal advice to the poor. Where justified, the Committee also furnishes free legal services in court.

RICHARD D. LOGAN
President

Nominating Petitions

(*Continued from page 372*)

the office of State Delegate for and from the State of New Hampshire, to be elected in 1940:

Frank J. Sulloway, Robert W. Upton, Amos Blandin, Jr., and Robert C. Murchie, of Concord.

George T. Hughes and Stanley M. Burns of Dover.

Maurice F. Devine, Paul E. Nourie, Wilfred A. Laflamme, Charles H. Barnard, J. Walker Wiggin, Alfred J. Chretien, William H. Craig, Omer H. Amyot, Robert P. Booth, John R. McLane, Allan M. Wilson, William J. Starr, Winthrop Wadleigh, Ralph E. Langdell, Eliot U. Wyman, John J. Sheehan, George F. Nelson, and John E. Tobin, of Manchester.

Robert B. Hamblett, Harry P. Greeley, George M. French, Robert E. Earley, Frank B. Clancy and Raymond C. Leahy, of Nashua.

RHODE ISLAND

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Chauncey E. Wheeler, of Providence, for the office of State Delegate for and from the State of Rhode Island, to be elected in 1940 for the vacancy now existing and for the regular three-year term to commence at the adjournment of the 1940 Annual Meeting:

Harold A. Andrews, Woodworth L. Carpenter, Frederick W. Tillinghast, Arthur M. Allen, Noel M. Field, James F. Armstrong, Roger T. Clapp, Frank L. Hinckley, Hayward T. Parsons, Albert deR. Baker, Albert A. Baker, James A. Higgins, Walter A. Edwards, Robert B. Dresser, Elmer E. Tufts, Jr., Henry B. Gardner, Jr., Gerald W. Harrington, Ronald B. Smith, Guerney Edwards, William H. Edwards, Eliot G. Parkhurst, T. Dexter Clarke, Thomas F. Black, Jr., George Paul Slade, Ronald C. Green, Jr., Richard E. Lyman, Wm. B. Greenough, James C. Collins, Daniel S. T. Hinman, Hoyt W. Lark, Marshall Swan, Westcote, H. Chesebrough, Arthur J. Levy, Russell P. Jones, and Harold E. Staples, of Providence.

New Orleans Bar Association

During the past year the membership in the Association has increased 45 per cent. Particularly gratifying is an increase in associate membership (those who have practiced less than five years) of 150 per cent.

To some extent at least the increase in associate membership is due to a plan inaugurated during the year of having a series of luncheon meetings for the discussion of recent court decisions and other current matters of interest to the bar. A committee of the younger members of the Association has been in charge of these meetings, and one of the younger members of the bar has at each of the luncheons delivered a short talk on the subject set for discussion. These meetings have been held every other month at a downtown restaurant and a goodly proportion of the members of the Association has attended.

The Association has recently deter-

(*Continued on page 382*)

DECISIONS ON FEDERAL RULES

(*Continued from page 366*)

shareholder at the time of the transaction of which he complains or that his share devolved on him by operation of law.

RULE 86—Effective Date

Scovill Manufacturing Company v. U. S. Electric Manufacturing Corp. (S. D. N. Y., WOOLSEY, D. J., Jan. 25, 1940.)

In an action for trade-mark infringement, brought before the effective date of the new Rules but coming on for trial after said date, if it appears that no injunction is warranted, the court should retain jurisdiction for the purpose of granting an accounting for past infringement.

Anna Katharine Schlaefer v. Wallace Clayton Schlaefer. (C. A. D. of C., RUTLEDGE, A. J., Feb. 5, 1940.)

The provision of Rule 12 (b) that no defense is waived by being joined with another should not be applied in an action pending on the effective date of the new Rules, in which jurisdiction of the person of the defendant had already been acquired by virtue of his having filed an answer joining objections to jurisdiction and defenses on the merits.

The new Rules may not be applied to actions pending on the effective date thereof in a manner that would nullify retroactively a jurisdiction previously acquired.

Articles in Legal Journals

(*Continued from page* 352)

Consequently, under article 13 of the Court's Statute the members of the court continue as holdover judges.

CONSTITUTIONAL LAW

Changing Constitutional Phases, by Thomas Reed Powell, in 19 Boston University L. Rev. 509. (Nov., 1939).

Once again it is inimitable T. R. P. who is speaking. "Of late in discussing constitutional questions with a class on Monday mornings, I have thought it wise to look at my watch to see if I could be confident that what I was about to say was still true. At noon the Supreme Court might begin to announce opinions that would rob me of much of my hard earned knowledge." The personalities of the justices and some of the issues that have been before them pass in review. "It is a pity that the Supreme Court is not astute enough to announce that for future transactions it will have a new rule but that past transactions will be governed according to reasonable expectations. . . . Yet to apply it involves public confession that the judges are makers and unmakers of the Constitution and not merely discoverers who are sometimes mistaken but ultimately set themselves right."

LEGAL PHILOSOPHY

The Economic Interpretation and the Law of Torts, by Roscoe Pound, in 53 Harvard L. Rev. 365. (Jan., 1940).

Here is a capital piece of writing attacking the "self-styled realists" for some of their naive attacks upon the judicial order. It is conceded that an economic interpretation of the general course of legal history is valid. Exception is taken to the attitude of extremists that particular decisions generally can be explained in this way. The effect of economic changes is slow and gradual regardless of classes. Where judges have been trained in the legal tradition, the strongest single influence in the determination of single decisions is the taught legal tradition. Proof of this lies in the analysis of three English cases where judges from the land-owning class decided adversely to the economic interest of land-owners. The main proof submitted for the realists, the fellow servant rule of 1837, is presented as an instance of unrealistic interpretation by the realists.

PROCEDURE

Jury Demands in the New Federal Procedure, by O. L. McCaskill, in 88 U. of Pennsylvania L. Rev. 315. (Jan., 1940).

The professor wields a lively pen and does a little "cracking down" on the Clark-Moore school of procedural reformers, while pointing out some weak spots in the new rules of procedure which declare that jury trial is to be preserved. The dilemma is this: "The greater the effort in the new system to obliterate the boundaries in the interest of simplifying pleadings, avoiding variances and new trials, and giving the relief the proof shows a party is entitled to, the more difficult it becomes to reconstruct the boundaries for the purpose of determining the right of jury trial and its extent." What is meant by rule 2 that there is "one form of action"? To answer that there has been a "merger" of legal and equitable remedies is to confuse. To say that there has been a "joinder" of the remedies is less jumbled and seldom causes trouble in the application of the right to jury trial. To what extent did the merger advocates succeed "in writing their overtones" into the new federal rules? There is no evidence of this in rules 2 and 38. But in rule 10 there is evidence of a flank movement, an attempt to institute "the story telling type of pleading". Much will depend upon court interpretation. As yet no known federal court has become a victim of "merger-itis," "the communism of legal and equitable remedies and insidious destroyer of constitutional jury rights."

TRADE REGULATION

Antitrust Activities of the Department of Justice, by Thurman W. Arnold, in 19 Oregon L. Rev. 22 (Dec., 1939).

The two most important problems of a neutral nation in time of war are (1) to prevent the dislocation of its economy and (2) to prevent profiteering. These are illustrated by an experience in the building industry. The government attempted to aid in the building of houses. But the channels of trade were blocked by combinations and restraints. Result? A building boom in 1936-37. Construction rose 27 per cent but the cost rose more than ten per cent throughout the nation and 25 per cent in some large cities. Thus there is a duty to "attack all of the restraints which hamper experimental organization and experimental techniques in building." The rule of reason in the antitrust laws broadly means "that a combination must justify itself through proof of greater efficiency of production or distribution." Under the statutes now existing there is a choice between civil and criminal procedure and the latter is the only effective means. This is regretted and it is hoped that future legislation will provide for civil penalties for these offenses which are in the nature of public torts. The government acts as a referee in the competitive game. The rules as a practical matter cannot be codified in advance. Clarification of the antitrust laws will come through the common-law method of applying a broad principle case by case.

TRADE REGULATION

Power of the Federal Trade Commission to Require Informative Labeling of Textiles, by Sumner S. Kittelle and Fred E. Campbell, in 20 Boston University L. Rev. 23. (Jan., 1940).

May, for example, the F. T. C. rule that it is an unfair trade practice to offer for sale rayon products without disclosing that they are rayon? The F. T. C. has made such a rule and is apparently proceeding to protect consumers by a system that requires fiber identification in textiles generally. The many attempts to secure Congressional action of this sort have been unsuccessful. "Non-disclosure in itself has never been declared by the courts to be an unfair practice under the Act." The courts have insisted that the legality of a practice is a question of law to be solved finally by the courts. The authors answer the question by concluding "that the failure to label is not an unfair trade practice unless consumers are deceived thereby and sellers are aware of the deception. Since this by no means necessarily follows from the failure to label, the promulgation of a general rule requiring labeling in all cases is probably in excess of the Commission's authority." They are particularly concerned about merchants, who, not being manufacturers of the original yarn, cannot in ordinary business operations know the true fiber content of many of their goods.

(*Continued from page* 380)

mined to take a forward step in legal aid in criminal matters. For some years the legal aid bureau, sponsored by the Association, has limited its activities to civil matters. The bureau during the coming year will extend its activities to the criminal field. It is proposed to place a full-time attorney in charge of this phase of the work. The bureau expects to extend aid to indigent accused persons, beginning from the time of their arrest and continuing through their trial, so that all of their legal rights may be preserved.

With the hearty cooperation of Judge Wayne G. Borah of the United States district court, the Association has been given a prominent part in naturalization proceedings. The Association believes that the conferring of American citizenship on aliens should be made as impressive as possible and with this end in mind has inaugurated a program including an address by a member of the Association to the newly admitted citizens in open court at the time of the taking of the oath of allegiance. On two occasions during the past year this program was carried out and was apparently well received.

An additional activity which was begun during the past year was the appointment of a special committee whose task it is to keep in touch with and examine all projects for the sale of new law books to the bar of the State, particularly those works devoted to Louisiana subjects. The initial experiences with the work of this committee have convinced the Association that its continuance is highly desirable.

Washington Letter

(*Continued from page* 284)

son that Group Health as a corporation is itself illegally practicing medicine. The United States District Court decided to the contrary some time ago, in a suit for declaratory judgment. There was no appeal, and the question, so far as we are concerned, may be said to be open. On this demurrer it is unnecessary, and indeed undesirable, that we should pass upon it except to decide whether, as described in the indictment, Group Health is necessarily violating the law."

Group Practice of Medicine

The element of a corporation engaging in the practice of medicine was thus treated in the opinion: "But in all the cases we have examined in which the practice has been condemned, the profit object of the offending corporation has been shown to be its main purpose, and in no case were the circumstances precisely like those described in the indictment, i. e., a non-profit organization, conducted so that the proper doctor and patient relationship is preserved; prospective patients organized only for the purpose of providing a clinic and paying doctors and hospital service out of members' dues; a plan designed not to interfere with the doctor's loyalty to his patient so as to commercialize medicine in a way contrary to the best interests of patient or practice, or to subject the physician to the corporation's control and make his practice a corporate act. As thus described, it is no more than a group of persons, under corporate organization, contributing stated sums of money monthly for the payment of prospective medical service to the extent they may be required. In these respects, it differs from the medicine-practicing corporations which in many of the States have been held to be illegal. Without more, therefore than now appears, we are unable to say that Group Health is illegally practicing medicine."